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**Filed**

DEC 20 2012

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

11 SECURITIES AND EXCHANGE )  
COMMISSION, )

12 Plaintiff, )

13 vs. )

14 SMALL BUSINESS CAPITAL CORP.; MARK )  
15 FEATHERS; INVESTORS PRIME FUND, LLC; )  
and SBC PORTFOLIO FUND, LLC, )

17 Defendants. )  
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Case No. 12-cv-03237 EJD

**DEFENDANT'S OPPOSITION REPLY  
ON ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP's  
(RECEIVER'S COUNSEL), MOTION  
FOR FIRST INTERIM PAYMENT  
(DOCKET NO. 135)**

1 **I Introduction and Cause to Deny Receiver's Counsel's Request for Payment**

2 Allen Matkins Leck Gamble Mallory & Natsis, LLP ("AMLGMN"), has applied for  
3 payments of its first interim fee, with source being from the income and the assets of the  
4 receivership estate. This payment request has been submitted concurrent with the request of the  
5 receiver, the Thomas Seaman Company.

6 AMLGMN is actively, and materially, participating in the constitutional, civil rights, and  
7 due process violations of the receiver, and of the plaintiff, and should be denied any, and all,  
8 requests for payment. Further, in this lawsuit, under guidance of counsel from AMLGMN, the  
9 receiver is facing a motion for discharge, due to Feathers, on his behalf, and for the non-managing  
10 members of the receivership estate, presenting to the court evidence of the receiver's violations of  
11 the Fourth and Fifth Amendments to the Bill of Rights to the Constitution, civil rights, and due  
12 process interferences by the receiver, aided by his counsel.

13 As the Commission's senior trial counsel, Bulgozdy, made note of, and wrote in his August  
14 10<sup>th</sup>, 2012 letter to the court to deny Feather's, in Feather's request for legal fees to provide the  
15 benefit of counsel to all of the members of the receivership estate – quoting from *FTC v. American*  
16 *Tax Relief, LLC, et al.*, Case No. 11-cv-6397DSF, slip opinion (C.D. Cal. Apr. 19, 2012), Bulgozdy  
17 notes: "The court rejected the application for an interim payment of fees, finding that "it is not at  
18 all unusual for attorneys to wait to be paid – if payment is appropriate at all – until after resolution  
19 by settlement or trial". Bulgozdy writes, further "Indeed, waiting until the case is completed to  
20 evaluate any fee application...will conserve judicial resources...". Indeed, in his order the week of  
21 December 19<sup>th</sup> denying an ex parte request of the receivership estate for a TRO and sanctions  
22 against the plaintiff, his Honor, Judge Davila, writes "...this case remains at the initial stages of  
23 litigation"; defendant asserts that it to be a strong likelihood of the court finding in favor of  
24 defendant's assertions of fraud on the court by the plaintiff, assisted by the receiver, and receiver's  
25 counsel, and violations of due process, in which case, no legal fees at all should be paid.

1 In a similar recent matter in Santa Clara County, where it had not been demonstrated their  
2 to be any benefits to the “parties protected” by the actions of counsel, upon appeal in favor of the  
3 moving party, the California Court of Appeals ruled against the awarding of all legal fees to  
4 counsel. This matter is outlined in the following news article:



11 Danny Reed in court, February 2012 (Karen T. Borchers/Staff file)  
12 The investigation

- 13 • Loss of Trust: Mercury News series on court-appointed conservators and trustees.  
14 • Document: Ruling in favor of Danny Reed

15 In a stunning ruling, a California appellate court on Thursday declared that a Silicon Valley trustee  
16 and his two attorneys are not entitled to a penny of compensation, after a years-long dispute over  
17 their six-figure bill to briefly manage a disabled San Jose man's life savings.

18 AMLGMN has not demonstrated, in any way, that releasing funds from the receivership  
19 estate to AMLGMN is in the interests of Feathers, or those members of the receivership estate  
20 whom Feathers represents. The receiver and receiver’s counsel should face the same criteria that  
21 the Commission has employed with respect to legal fees for Feathers and for the members of the  
22 receivership estate, whom Feathers represents as their lawful and true attorney in-fact, and, in  
23 particular, in light of the serious charges which have been outlined of the receiver’s transgressions  
24 in neutrality and in his constitutional, civil rights, and due process violations.

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26 **II AMLGMN is Aiding the Receiver and the Commission in their Constitutional, Civil**  
27 **Rights, and Due Process Violations**

1 The plaintiff, United States Securities and Exchange Commission (the "Commission") and  
 2 its officers, are directing the receiver, who is aided by his counsel in his every step, as to how to  
 3 prepare their court submissions, as well as how to maintain their receivership web site. The  
 4 receiver's counsel is fully aware of the due process, constitutional, and civil rights violations of the  
 5 Commission (the "Commission"), and is the third leg of this trio that has engaged in a seizure of  
 6 the assets and income of the receivership estate, all of which was predicated on the false and  
 7 fraudulent statements of Officers of the Commission in its complaint and in its subsequent  
 8 communications with the court.

9 With AMLGMN's full awareness of these matters, the Commission is directing the  
 10 receiver's wording choices, and schedules of which exhibits are made available to investors and  
 11 creditors on the receiver's web page, which is causing violations of neutrality, and creating a web  
 12 site that is self-serving to meet the needs of the Commission, and to the receiver, and that is not in  
 13 the best interests of the members of the receivership estate. These matters of the Commission  
 14 causing violations of third party neutrality, and, with the advice of his counsel, the receiver's ability  
 15 to report upon accurately, and without bias, the forensic matters for which the court instructed this  
 16 assignment to the receiver, are matters which warrant the full discharge of this lawsuit, and a full  
 17 denial of payment to AMGLMN.

### 18

### 19 **III Hourly Billing Rate of AMGLMN**

20 As does the receiver, AMGLMN frequently references waiver of fees, and the employment  
 21 of special discounts. AMGLMN shows 299 billing hours, and asks for \$135,864. This equates to  
 22 more than \$400 per hour. These billings include substantial charges at the full billing rate for:

- 23 1. Air travel hours and stays in hotel with the finest overnight accommodations. Mr.  
 24 Fates, for example, incurred almost \$4,000 in billings for just travel and hotel from San  
 25 Diego to San Jose over just a two day period on June 28<sup>th</sup> and 29<sup>th</sup>.

26	06/29/12	1858182	Lodging -- Edward G. Fates - Larkspu Landing - hotel expense in San Jose	1.00	234.23
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06/29/12	5602833	Travel from hotel to SB Capital offices (.4); travel from Los Altos to San Diego (3.8).	Fates, Edward G.	4.2	1,757.70
06/28/12	5602828	Travel to SB Capital offices in Los Altos (4.2); travel from SB Capital offices to hotel (.4).	Fates, Edward G.	4.6	1,925.10

2. For attempts to charge the receivership estate thousands of dollars for researching “usury” laws, despite no evidence of the small business borrowers of the receivership estate ever having complained of such, or of any of the many federal and state audits of the receivership estate ever having demonstrated such practices by the lending entities of the receivership estate

07/25/12	5586363	Discuss investigation of lending license issues/usury law concerns			
07/25/12	5594557	Research California licensing and usury requirements for SB Capital and SBC Portfolio Fund, LLC	Klokow, Anne E.	3.2	1,771.20

3. The drafting and, or, full review of the Receiver’s “unsolicited” (in the receiver’s words) letter of August 10<sup>th</sup>, 2012, to the court, in which the receiver made, against Feathers, false or misleading accusations, employed material omissions, and employed high levels of illusory, all while AMGLMN was his counsel and was aware that the receiver was violating the Fourth and Fifth Amendments to the Constitution, and all to contest Feathers being awarded legal fees, which would have been for the benefit of the receivership estate, and all of which AMGLMN employed to help the receiver interfere with Feather’s and the receivership estate’s due process entitlements.

4. Evidence that AMGLMN was fully aware of Feathers’ high level of compliance activities in the matters of disclosures in its offering documents, and having no matters to conceal, Feather’s full cooperation at all times with the plaintiff before the order and injunction, and as evidenced by AMGLMN’s review of all of Feather’s emails, correspondence, and submissions to Doss Law and Spiegel Accountancy, while

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AMGLMN, at all times, has not interfered, or advised against, the Commission and the Receiver in perpetuating the wrongful impression that Feathers had been in violation of these matters of disclosure, or in violation of matters of normal and acceptable business practice.

- 5. Drafting and managing costly efforts of subpoenas to the credit card issuers of SB Capital, while having in their possession (or the receiver’s possession), or readily available from the Commission, all historical billings in these matters, none of which has ever been demonstrated by the Commission, by the receiver, or by AMGLMN’s show any wrongful activities of Feathers or other employees of the receivership estate.
- 6. Aiding in the receiver’s and Commission’s efforts, which have, clearly, since the time of their sealed applications to the court, to make defunct, and without the benefit of qualified legal representation, the entities of the receivership estate, and which have been based upon fraudulent statements of officers of the commission, and subsequent to these events, has been assisted by illusory and wrongful presentations of the receiver.
- 7. Confirming that Feathers’ past securities and business law counsel has been so intimidated by the actions of the SEC, and the prospect of future scrutiny, that the prior counsel wrote a damaging, flawed, and wholly fabricated letter to Feathers, and then flew the coop to Mexico:

08/03/12	5600341	Address issues related to report/accounting and investigation of the credit card expenditures/subpoena responses (.3). Follow-up on the investigation of counsel in Mexico and discovery issues ( 3).
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1 8. Has spent time, in pursuit of their own billable hours for thousands of dollars, in  
 2 reviewing past lawsuits of the entities of the receivership estate which have no bearing  
 3 on these matters.

4	08/22/12	5827538	Document review of pleadings and correspondence provided by SBC Capital's prior attorneys re SBC Capital's lawsuit against Peter Cline et al	Bui, Kim A.	4.5	1,194.75
5						
6						
7	08/23/12	5827617	Continue document review of pleadings and correspondence re SBC Capital's litigation against Cline	Bui, Kim A.	2.0	531.00
8						
9						

10 9. Has assisted the receiver in their Fourth and Fifth Amendment violations against  
 11 Feathers, while providing counsel to receiver to not acknowledge Feathers repeated  
 12 requests for the return of their unlawful holdings of Feathers' privileged work product:

13	09/13/12	5837187	Review scheduling orders and participate in Rule 26(f) conference of counsel; discuss Feathers' request to pick up personal files/items with E. Gordon.	Fates, Edward G.	1.1	480.35
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15						
16						

17 10. Unnecessarily charged thousands of dollars for review and preparation of loan  
 18 documents for borrowers who have paid off their loans:

19	07/23/12	5585185	Draft Loan Modification Agreement for Loan to 895 Oak Grove Associates and PCC Holdings LLC, including guaranty/ suretyship waivers due to additional deed of trust	Klokow, Anne E.	3.0	1,660.50
20						
21						

22 Unfathomably, until, or unless, one considers the overly broad and far reaching  
 23 employment of abuses by the Commission, the receiver and the receiver's counsel send their draft  
 24 reports directly to John Bulgozdy of the Commission, for his review, prior to court submission by  
 25 the receiver. This provides the Commission with wrongful opportunities to interfere with due  
 26

1 process, and causes bias, if not outright violations of the law, with its instructions to the receiver to  
2 make changes for aiding the Commission' own cause.

3 The Commission causes the receiver to violate neutrality by routing his narrative reports to  
4 Bulgozdy before submission to the court; the receiver also charges the receivership estate  
5 substantial amounts for the efforts of forwarding these items to Bulgozdy.

6 These matters provide evidence of the Commission causing bias in court submissions,  
7 causing a lack of neutrality by the receiver, and that Bulgozdy and the Commission is impeding  
8 with the court's requirements for an impartial third party review.

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10 **IV No Payments – Of Any Amount - Should be Made to the Receiver or to their Counsel**

11 *Pro se* defendant Feathers, on his own behalf, and as the lawful and true attorney in-fact for  
12 the four hundred, or so, non-managing members of the receivership estate, strongly contests any  
13 reparations to the receiver and to those he has employed; the receiver has acquiesced to the overly  
14 broad and abusive acts of the Commission in committing constitutional, civil rights, and due  
15 process violations, all while both are trying to make defunct the entities of the receivership estate,  
16 and has caused his own similar violations while doing so.

17 The court is specific in its explicit and implicit instructions about the duties and  
18 responsibilities of its appointed receivers. Under undue pressure from Bulgozdy and the  
19 Commission, the receiver has violated notions which lie at the heart of court appointments of  
20 receivers, and which include reliance upon qualified third party stewardship under a receiver,  
21 proper fulfillment of fiduciary obligations, and properly providing accurate and unbiased forensic  
22 work to the court. The receiver's counsel has actively participated in due process violations of  
23 Feathers efforts to establish legal counsel for himself and for the four hundred, or so, non-  
24 managing members of the receivership estate, as evidenced by their following billing journal entry:

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08/07/12	5601718	Review relevant documents and draft letter brief regarding use of receivership estate funds to pay Feathers' counsel and discuss same and Receiver's (2) [unclear]
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1 From the day of the execution of the unlawfully predicated general seizure of the entities of  
 2 the receivership estate, followed very shortly by the firing of eighty percent of the employees, the  
 3 receiver’s counsel has worked with the receiver on their strategy to make defunct all of the entities  
 4 of the receivership estate, well before any lawful determinations could be made, and at a hurried  
 5 speed so as to avoid the possibility of the defendant’s gathering their resources to demonstrate to  
 6 the court the fraud behind the Commission’s efforts in these proceedings.

7 The single most valuable assets of the entities of the receivership is their unique SBA Small  
 8 Business Lending Company license, one of only fourteen in the United States. Within twenty four  
 9 hours of the general seizure, the receiver and his counsel were strategizing on how to sell this asset,  
 10 and effectively take the heart out of the companies:

11 06/28/12 5563850 Review issues related to SBA and  
 assess the license, follow-up (.7).

12  
 13 July 10<sup>th</sup> entry:

for receivership (.2); preliminary  
 research regarding assignability of  
 SBA lender license (.6).

14  
 15 July 11<sup>th</sup> entry:

legal issues related to SBA license,  
 value/transfer, assignment of the  
 same (1.4). Review approach to Bank

16  
 17 The receiver and his Counsel conducted no independent research into Feathers and the  
 18 entities of the receivership estate, relied entirely upon the fraudulent statements of the plaintiff, and  
 19 within a day of their arrival wasted no time in contacting other federal authorities such as the FBI  
 20 and the US Attorney’s office, to make sure that Feathers’ future would be filled with unjustified  
 21 efforts spent on criminal defenses as well as civil defenses:  
 22

23 06/29/12 5563857 Calls/email with Barilla re proposed  
 borrower and follow-up with Receiver  
 24 (.4). Conference with Receiver to  
 coordinate work, address pending  
 25 loans, investigation and  
 reporting/accounting issues (.5). Call  
 26 with AUSA/FBI concerning the case  
 (.4).

1 From the outset, the receiver's counsel actively colluded with the receiver and the plaintiff  
 2 in avoiding any neutrality, and in providing uniformly one-sided reports to the court, aka  
 3 "supporting the plaintiff's marketing and spin machine", to ensure that no due process would be  
 4 introduced into these matters:

5  
 6 07/06/12 5571184 Address emails from SEC and follow-  
 7 up with Receiver re same (.4). Call  
 8 related to Feathers representation  
 9 (.2). Address issues related to loan  
 10 servicing, operations and legal issues  
 11 re same (.4). Call/email with Receiver  
 12 related to report and work on draft  
 13 revisions to same (1.8). Review SEC  
 14 comment to draft and further revisions  
 15 (.4).

#### 10 **V Opportunistic and Self-Serving Actions of AMLGMN**

11 On his own behalf, and on behalf of those whom he represents, Feathers is dismayed at the  
 12 substantial takings of income and capital from AMLGMN's actions which may now, including  
 13 those which have been unlawful and unconstitutional. Going into this assignment, AMLGMN was  
 14 aware that the entities of the receivership estate held \$10M or more in cash balances, and were  
 15 generating substantial ongoing income. A revenue opportunity to assist their client in the illicit  
 16 taking of such low hanging fruit is one that they could not pass upon.

17 With net revenues before expenses to the receivership estate of several hundred thousand  
 18 dollars per month from interest income and loan servicing income, there is no doubt of the estate's  
 19 perceived ability to absorb marginal expenses which would be incurred to educate all interested  
 20 parties on the receivership related expenses which are borne from the Commission's unwarranted  
 21 and unlawful actions, and the receiver's implicit assistance to the Commission in their actions.

#### 23 **VI Under guidance of his counsel, The Receiver has Failed to Obtain a Specific** 24 **Performance Bond for His Activities**

25 The receiver, and his counsel, in their submissions to the court, and due to the abuses of the  
 26 Commission's influence with the receiver and his reports to the court, within their overly  
 27

1 generalized statements, have minimized any and all references to the potential score of lawsuits by  
 2 small business owners who have been damaged by the receiver's actions of cancelling \$25,000,000  
 3 in contractual loan funding commitments, and the impact of \$10,000,000 in lost revenues to the  
 4 receivership estate.

5 By requiring its reports to be screened by the Commission, the Commission is causing the  
 6 receive to not reflect liabilities from harm to others in these matters; the receiver believes itself,  
 7 misguidedly, to have no recourse for its actions because of its belief in "quasi-judicial" (this phrase  
 8 is from the receiver's prior submissions to the court) reliefs and protections afforded to it.

9

10 **VII The Receiver's Counsel Recognizes the Unlawful Premise and Actions of the**

11 **Commission**

12

13 <sup>2</sup> **The Receiver notes that no judgment has been entered in this action and that Mr.**  
 14 **Feathers is contesting the Commission's allegations. In the event the Commission does**  
**not prevail, the assets may be returned to the Defendants rather than distributed directly**  
**to investors and creditors.**

15

16 Defendant strongly asserts that receiver's counsel continues to grossly overbill, while  
 17 recognizing the serious flaws in the Commission's lawsuit, and while also having directly  
 18 contributed to the harm(s) caused, and which are continuing, and while continuing to promote  
 19 grossly inflated, and wholly unacceptable, billings which are in AMLGMN's own self-interest.

19

20 **VIII The True Cost of the Counsel's Work is Three Time the Amount of their own Billings**

21

22 The AMLGMN billing represents substantial depletion of the assets and income of the  
 23 receivership estate, with no benefits demonstrated to the receivership estate. AMLGMN shadows  
 24 every move of the receiver. From the beginning of these matters, by including his counsel on most  
 25 matters, the true overall rates to the receivership estate are more closely in the range of \$500 or  
 26 more per hour.

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1 The receiver's counsel participated in a general seizure of SB Capital, Feathers, and the  
 2 other receivership estate entity's assets, relocated all company assets, books, and records, more  
 3 than three hundred miles away, and broke SB Capital's lease. Before any legal decisions have been  
 4 made as to final disposition of these matters, the receiver, and his counsel, bid out at auction all of  
 5 SB Capital and Feathers valuable office furnishings, at pennies on the dollar, not enough to even  
 6 cover legal fees, and charged \$300 per hour to the receivership estate to offer SB Capital's landlord  
 7 the following advice about filing a claim in the future against Feathers:

8  
 9 Email exchange and phone call with property manager for 419 S. 300.00/hr  
 San Antonio regarding removal of furniture, condition for turnover.  
 Also discussed move out and their ability to file a claim later.

10  
 11 AMLGMN's first order of priority has been to help the receiver make the entities defunct,  
 12 including selling them for pennies on the dollar before any legal determinations were to be made:

13  
 14 07/27/12 5593674 Call from investor related to SB  
 Capital matter, possible sale of  
 business and follow-up with Receiver

15  
 16 **IX Receiver's due-process interferences, under Guidance of Counsel**

17 In an ironic twist of Feathers' and the receivership estate's own monies being used against  
 18 them, AMLGMN has played an active role in drafting, editing, etc., the content matter of the  
 19 receiver's "unsolicited" letter of August 10<sup>th</sup>, 2012, which has throughout false and misleading  
 20 statements, material omissions without end, and is written in a wholly illusory way, to accomplish  
 21 its goal of interference with Feathers' due process in being awarded legal fees, on their self-  
 22 servicing behalf and for the Commission:

23 08/07/12 5601718 Review relevant documents and draft Fates, Edward G. 4.1 1,715.85  
 24 letter brief regarding use of  
 receivership estate funds to pay  
 Feathers' counsel and discuss same  
 and Receiver (2.9); research  
 25 attorney-client privilege issue  
 regarding Doss letter ( 4); discuss ex  
 parte application for relief from local  
 26 rules with Receiver and instruct K. Bul  
 as to drafting of same (.8).

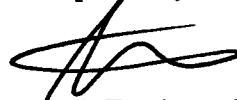
1 Subject letter, and the receiver's and his counsel's time keeping journal entries and  
2 descriptions, all played a large role in demonstrating to Feathers that the receiver and the plaintiff,  
3 and apparently the receiver's counsel, undeniably, are all actively working together in violations of  
4 neutrality, violations of Constitutional matters and civil rights, and in their collective due process  
5 interferences for the receivership estate receiving proper counsel; subject letter worked on by  
6 AMLGMN was a part of the basis for the defendant's filing of a motion to discharge the receiver,  
7 and now, for a request to defer discovery until Feathers and other non-managing members of the  
8 the receivership estate are properly represented by counsel.

9  
10 **X Conclusion**

11 The Commission, aided by the receiver and by AMLGMN, has committed acts of fraud,  
12 omission, and deception, and on matters which are at the very heart of its complaint. The  
13 Commission has committed constitutional, civil rights, and due process violations. The  
14 Commission has caused its relationship with the receiver and his counsel to be much more than  
15 which is typical of an illicit partnership than to be one which is arms-length in nature.

16 For the foregoing reasons, and because harm to the defendants has occurred, and is  
17 continuing to occur, the Court should deny AMLGMN's request for payment. If there is to be a  
18 payment, in the future, defendant asks that the court require substantial concessions from  
19 AMLGMN on the amounts billed.

20 Respectfully submitted,

21 

22 Mark Feathers, *Pro Se* Defendant

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28 12-20-12