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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15
16 SECURITIES AND EXCHANGE
COMMISSION,

17 Plaintiff,

18 vs.

19 SMALL BUSINESS CAPITAL CORP.;
20 MARK FEATHERS; INVESTORS PRIME
FUND, LLC; and SBC PORTFOLIO
21 FUND, LLC,

22 Defendants.

Case No. CV12-03237

**RESPONSE TO (A) OPPOSITION OF
DEFENDANT MARK FEATHERS,
(B) DECLARATION OF STEPHEN PAHL,
(C) LETTER FROM HELEN HUNSAKER,
(D) LETTER FROM CHARLOTTE WU,
AND (E) LETTER FROM THE JEFF AND
JANE SHEN TRUST REGARDING
RECEIVER'S FIRST INTERIM FEE
APPLICATION**

Date: February 22, 2013
Time: 2:00 p.m.
Dept: 4 - 5th Floor
Judge: Hon. Edward J. Davila

1 Thomas A. Seaman ("Receiver"), the Court-appointed permanent receiver for Small
2 Business Capital Corp. ("SB Capital"), Investors Prime Fund, LLC ("IPF"), SBC Portfolio
3 Fund, LLC ("SPF") and their subsidiaries and affiliates (collectively, the "Receivership Entities"),
4 hereby responds to Defendant Mark Feathers' Opposition, Stephen Pahl's declaration and the
5 letters filed by investors Helen Hunsaker, Charlotte Wu and the Jeff and Jane Shen Trust regarding
6 the Receiver's First Interim Fee Application.

7 I. INTRODUCTION

8 A. Mr. Feathers' Opposition

9 Defendant Mark Feathers has been barraging the Court with motions repeating the same
10 spurious accusations over and over. Recently, Mr. Feathers has taken to filing objections to any
11 and all relief sought by anyone else, including administrative relief. Mr. Feathers' latest attack is
12 on the Receiver's First Interim Fee Application ("Fee Application"). Mr. Feather's arguments,
13 which are addressed below, have no merit.

14 B. Mr. Pahl's Declaration

15 Investor and former outside counsel for the Receivership Entities, Stephen Pahl, argues
16 that the Receivership Entities are a small, simple operation and that the fees and costs of the
17 Receiver and his counsel are "out of proportion" with the size of the estate. Mr. Pahl goes as far as
18 to characterize the Receiver and his counsel as "a pride of lions on the Serengeti which have [sic]
19 cornered a poor gazelle." Mr. Pahl's arguments and attacks are baseless. As discussed below, the
20 Receivership Entities paid their employees (not including outside counsel) far more per month
21 than the requested fees of the Receiver and his counsel combined.

22 Mr. Pahl also questions whether the hourly rates billed by the Receiver and his counsel are
23 "commercially reasonable in the San Jose Metropolitan Area." Mr. Pahl presents no evidence
24 suggesting that the hourly rates charged by the Receiver and his counsel are inconsistent with
25 those charged by similarly skilled and experienced receivers and counsel in regulatory
26 receivership matters, whether such matters are located in San Jose or anywhere else. The
27 Securities and Exchange Commission, which has extensive knowledge of rates charged by
28 receivers and their counsel in regulatory receivership matters located throughout the country,

1 supports the fee applications of the Receiver and Allen Matkins, and asserts that the requested fees
2 are reasonable.

3 **C. Letters from Investors**

4 The Receiver also addresses the questions and concerns raised by Ms. Hunsaker, Ms. Wu
5 and the Jeff and Jane Shen Trust in their respective letters, which primarily focus on the timing of
6 interim payments to the Receiver and his counsel, and the Court's review of fee applications.

7 While these questions are understandable and are often raised by investors in regulatory
8 receiverships, interim payments to receivers are necessary. While everyone wants the litigation
9 between the Commission and Mr. Feathers to be resolved quickly and receivership funds returned
10 to investors, the reality is that litigation takes time. Without interim payments during
11 receiverships, receivers would not be able to pay their employees and other operating expenses of
12 their companies.

13 With regard to supervision of the Receiver and review of fee requests, the Court supervises
14 the Receiver's activities and reviews the fees and costs of the Receiver and his professionals to
15 make sure the amounts requested are reasonable in light of the work performed, time expended,
16 results achieved, and level of skill and expertise required. As discussed below, the Receiver has
17 worked diligently and efficiently in carrying out his duties pursuant to the Court's orders and has
18 provided great value to the receivership estate. Accordingly, the Fee Application should be
19 approved.

20 **II. MR. FEATHER'S OPPOSITION**

21 **A. Receiver Neutrality**

22 Mr. Feathers' latest accusation regarding the Receiver's neutrality focuses on references in
23 the Receiver's bills to conferring with counsel for the Securities and Exchange Commission
24 ("Commission"). Mr. Feathers' contends that these time entries show that the Commission is
25 "directing" and "instructing" the Receiver, "overreaching" and "applying undue pressures" on the
26 Receiver. Docket No. 138.

27 To the contrary, there is nothing improper about the Receiver conferring with counsel for
28 the Commission on issues pertaining to the receivership. Counsel for the Commission

1 occasionally gives input on reports, information posted on the receivership website, and other
2 matters pertaining to the receivership. The Receiver and his staff have also communicated with
3 Mr. Feathers on issues relating to the receivership. Mr. Feathers has sent numerous emails
4 expressing his views and encouraging the Receiver to take certain action. Nothing requires the
5 Receiver not to communicate with the parties. The Receiver has exclusive control of his reports,
6 the receivership website, and all other aspects of the receivership, subject only to Court approval.

7 **B. Billing Rates**

8 Mr. Feathers previously argued that the Receiver should not have terminated the
9 Receivership Entities' former employees because the Receiver does not have the unique skills and
10 qualifications necessary to manage and operate the Receivership Entities. Docket No. 103.
11 Feathers now argues that the Receiver and his staff are overpriced because the work the Receiver
12 is doing is not complex and SB Capital paid its employees less to do the same work. Docket
13 No. 138. Feathers not only contradicts himself, but is wrong on both counts.

14 The Receiver's evaluation and decision to terminate the majority of the Receivership
15 Entities' employees as well as his experience and skill in handling complex receiverships are
16 discussed in the Receiver's Response to Mr. Feathers' Motion to Dismiss Receiver.
17 Docket No. 117, p. 4. The Receivership Entities' monthly payroll and related expenses in May
18 2012, the month before the Receiver's appointment, was approximately \$258,000. The Receiver's
19 monthly fees during the relevant Application Period are approximately a quarter of that. The
20 monthly payroll was initially reduced to \$24,000, and in December 2012, was further reduced to
21 \$14,000. The Receiver is also performing duties – including attending court hearings, preparing
22 reports to the Court, and conducting a forensic accounting – which go above and beyond
23 managing the companies. Accordingly, the Receiver is operating the Receivership Entities (and
24 performing additional receivership duties) for substantially less than the companies' pre-
25 receivership payroll.

26 Mr. Feathers admits he "is not familiar with billing rates which are typical within work
27 categories for court appointed receivers." Opposition, Docket No. 138, p. 14. The Receiver is
28 familiar with such rates, as is the Commission, and likely the Court as well. A blended billing rate

1 of \$226 per hour is imminently reasonable for regulatory receivership work. The Commission
2 supports the Fee Application, and asserts that the requested fees are reasonable.

3 Obviously, not all tasks require the Receiver's experience and skill. The Receiver
4 delegates tasks to agents whose hourly rates range from \$50 to \$320 per hour, and staffs each task
5 as efficiently as possible. In addition, as explained in the Fee Application, the Receiver has not
6 billed for his travel time or expenses, which has already resulted in a cost savings of more than
7 \$25,000.

8 Mr. Feathers goes through the Receiver's bills line-by-line and isolates small tasks that he
9 argues could have been handled by lower-level employees. While this might be true in the
10 abstract, it ignores the practical realities of daily life. Almost all of us handle small tasks in our
11 jobs that don't require all of our skill and expertise. Sometimes it is faster and more efficient to
12 handle a small task yourself, rather than instructing someone else how to do it. It is only because
13 the Receiver and his staff are required to describe their work in six minute increments that
14 Mr. Feathers is able to isolate small tasks in the Receiver's bills and harp on them.

15 Even the few entries Mr. Feathers has hand-picked do not support his claim that the billing
16 rates of the Receiver's staff are not appropriate for the tasks involved. The time entries include
17 "set up accounting system in Quickbooks" by an employee billed at \$140 per hour, "reconcile
18 bank statements" (a necessary expense of controlling the resources of the receivership estate) by
19 an employee billed at \$175 per hour, and handling termination of the lease in Los Altos by an
20 employee billed at \$300 per hour. These tasks require experience and skill in accounting and
21 equity receivership matters.

22 Mr. Feathers also questions the "Litigation and Support" category of the Receiver's fees
23 and contends that this shows the Receiver talking "ad infinitum, to his own legal advisors. . . ."
24 Opposition, Docket No. 138, p. 15. The total time billed in the Litigation and Support category is
25 0.5 hours. Overall, the total fees for times entries Mr. Feathers claims were billed at excessive
26 rates is \$2411.00 – less than 1% of the requested fees. Moreover, the Receiver does not believe
27 that the rates charged for the tasks identified were excessive or unreasonable.

28

1 More importantly, the Receiver has accomplished a lot in a short period of time and
2 provided great value to the receivership estate. Pursuant to the Court's orders, the Receiver has
3 taken control of the Receivership Entities, preserved and protected their assets, reduced the
4 operating expenses of the business, increased monthly profits and cash balances, and provided
5 regular reports to the Court. He has made substantial progress in his forensic accounting and will
6 provide a report on the same to the Court on January 15, 2013. He has sought approval of
7 procedures for the administration of claims and will move the claims process forward as soon as
8 such procedures are approved. The Receiver's requested fees are at the very reasonable blended
9 hourly rate of \$226 per hour. The Receiver expects his blended hourly rate to decline to less than
10 \$195 per hour for the October, November, December time period.

11 **C. Misplaced Time Entry**

12 The Receiver acknowledges that one time entry in his bills is misplaced and should be
13 removed. On July 16, 2012, there is a time entry of .3 hours and \$40.50 in fees that relates to
14 another receivership matter. Mr. Feathers identifies this time entry on page 18 of his opposition,
15 lines 18-20. The Receiver has submitted an amended proposed order herewith, reducing his
16 requested fees by \$40.50.

17 **D. Forensic Accounting**

18 Mr. Feathers mischaracterizes the Receiver's statement in his motion seeking approval of a
19 claims procedure that "it appears the business records of the sale of membership interests and
20 payment of returns to investors were accurately maintained, and are generally reliable" proves that
21 a forensic account is unnecessary. Mr. Feathers' conclusion is incorrect. The accounting for
22 member investments and returns, while appearing to be accurate, is not maintained in Quickbooks,
23 but rather in a separate database designed for that use. The accuracy of membership interests has
24 no bearing on the accuracy of the financial accounting records of the Receivership Entities. As
25 previously reported, the Receiver has reviewed the Receivership Entities books and records and
26 found them to be incomplete in that the Quickbooks files begin on January 1, 2010 with beginning
27 balances as of that date, but there is no visibility prior to that time. While there are Quickbooks
28 files for periods preceding January 1, 2010, the Receiver has a low degree of confidence in them

1 and the current controller could not answer questions about the accuracy of entries made prior to
2 her employment in January 2012. Most importantly these Quickbooks files contain numerous
3 accruals and journal entries and cannot be used to perform a cash basis sources and uses analysis
4 of investor funds. The Receiver therefore continues to believe that the forensic accounting is
5 necessary to determine how money raised from investors was utilized.

6 **E. Information Provided to Investors**

7 Mr. Feathers complains that investors are not getting enough answers about the case and
8 the receivership. The Receiver has filed three detailed reports on his activities and has posted
9 those reports on his website. The Receiver encourages investors to read these reports. They
10 contain a great deal of information and effort is made to avoid legalese so they can be easily
11 understood. In addition, the Receiver has sent two letters to investors, updated his website 16
12 times (each time an email notice of the update goes out to the approximately 275 investors who
13 have signed up to receive such emails), and responded to hundreds of calls and emails from
14 investors and other interested parties. The Receiver's next report will be filed and posted on his
15 website on January 15, 2013. In addition, as soon as procedures for the administration of claims
16 have been approved by the Court, investors will receive a notice and instructions on how to
17 complete and submit claims to the Receiver.

18 The litigation between the Commission and Mr. Feathers is ongoing. Accordingly, there is
19 no information the Receiver can provide at this time regarding when distributions will be made or
20 how much will be distributed. The claims and defenses asserted by the Commission and
21 Mr. Feathers must be resolved, and the Court must approve a plan of distributing assets before the
22 timing or amounts of distribution will be known. While the Receiver certainly understands
23 investors' anxiety and desire to know the outcome, the answers are just not yet known.

24 In this regard, although Mr. Feathers continues to represent that he acts on behalf of
25 investors (this is discussed further below) and complains that they are not getting answers, his
26 actions tell a different story. Mr. Feathers has opposed every motion filed by the Receiver,
27 including the motion seeking approval of claim procedures, and has sought to effectively stop the
28 litigation so that his numerous attacks on the Commission and the Receiver can be heard before

1 anything else is accomplished. Mr. Feathers' repeated attacks and efforts to obstruct the case from
 2 progressing will only draw out the litigation and delay distributions to investors.

3 **F. Other Matters Not Relevant to the Fee Application**

4 Mr. Feathers raises several issues which simply are not relevant to the Court's
 5 consideration of the Fee Applications, including (a) the Receiver's ability to operate his company
 6 while only being paid periodically, and (b) the Receiver's profit-margin for his work on this case.
 7 As discussed above, when considering whether to approve fees and costs of receivers and their
 8 professionals, courts should consider the services provided, the time expended, the results
 9 achieved, and the level of skill and expertise required. *See United States v. Code Prods. Corp.*,
 10 362 F. 2d 669, 673 (3d Cir. 1966); *In re Imperial 400 Nat'l, Inc.*, 432 F.2d 232, 237 (3d Cir.
 11 1970). The internal finances of the Receiver's company, including the cash flow of his business
 12 and the profit-margin for his work, are not relevant.

13 **G. Mr. Feathers' Continuing Misrepresentations Regarding His Authority to**
 14 **Speak for Investors**

15 Finally, Mr. Feathers should be directed to stop representing himself to be the "lawful and
 16 true attorney-in-fact" for the investors. Pursuant to the Court's orders, Mr. Feathers has been
 17 removed from all his former roles with the Receivership Entities. The Receiver has been
 18 contacted by numerous investors who are confused by Mr. Feathers' representations that he is their
 19 "attorney-in-fact." Mr. Feathers is prohibited from taking any action on behalf of the Receivership
 20 Entities, and investors should not be misled into believing he speaks or acts on their behalf in
 21 connection with this proceeding.

22 **III. MR. PAHL'S DECLARATION**

23 Investor and former outside counsel for the Receivership Entities, Stephen Pahl, argues
 24 that the Receivership Entities are a "a small loan production and loan administration company
 25 with limited accounting, limited employees, and a discreet number of transactions," and therefore,
 26 the requested fees and costs of the Receiver and Allen Matkins are "completely out of proportion"
 27 to the "corpus of the estate." Docket No. 150. This argument has no merit.

28

1 The Receivership Entities' monthly payroll and related expenses (not including legal
2 expenses) in May 2012, the month before the Receiver's appointment, was approximately
3 \$258,000. The Receiver seeks payment of \$217,697.85 for approximately 14 weeks of work.
4 Over the same period, the Receivership Entities would have paid their employees approximately
5 \$840,000. Even if you include Allen Matkins' requested fees of \$122,227.96, and the amount paid
6 to employees of the Receivership Entities that the Receiver retained (\$84,113), the combined total
7 is still far less than the Receivership Entities would have paid their employees (exclusive of
8 amounts paid to outside counsel).

9 The fees of a receiver taking control of an actively operating business are necessarily
10 higher during the first few months than in subsequent months. The Receiver's fees in July were
11 \$91,058, in August were \$66,905.50, and in September were \$41,689.50. This makes sense
12 considering that assuming control and management of an active lending and servicing operation
13 requires considerable time to gain a full understanding of the business, its assets, accounting and
14 IT systems, records, outside professionals, borrowers, investors and creditors. These are one-time
15 costs associated with the transition.

16 In addition, during the 14-week application period, the Receiver filed two reports on his
17 activities with the Court and attended at least four Court hearings and teleconferences. Obviously,
18 prior to the receivership, the Receivership Entities never had to perform these receivership-
19 specific duties. Therefore, in relation to the pre-receivership payroll of the Receivership Entities,
20 the Receiver's fees are increased by the one-time costs associated with the transition, as well as
21 fees associated with duties unique to the receivership. Nevertheless, even including these one-
22 time transition fees and fees unique to the receivership, the Receiver and his counsel seek payment
23 of far less than the Receivership Entities would have paid their employees during the same 14-
24 week period.

25 IV. LETTER FROM MS. HUNSAKER

26 The main concern raised by Ms. Hunsaker, through her daughter as trustee, is that she has
27 not received any return of her funds yet. Docket No. 149. In light of this, she questions whether
28

1 the Receiver should be paid now. She also contends that the amount of requested fees is high and
2 that the Receiver should not be paid more than Mr. Feathers was paying himself.

3 As discussed above, everyone, including the Receiver, would like the litigation between
4 the Commission and Mr. Feathers to be resolved quickly and funds returned to investors. The
5 reality, unfortunately, is that litigation takes time. The Receiver has made substantial progress on
6 his forensic accounting, and will provide an accounting report with his next interim report on
7 January 15, 2013. The Receiver has also sought approval of procedures for the administration of
8 claims. These steps will expedite the process of distributing funds to investors, if and when such
9 distributions are authorized by the Court.

10 In the meantime, interim payments to receivers and their professionals are customary and
11 appropriate to allow receivers and their professionals to pay their employees and other operating
12 expenses. Final approval of fees is reserved for the conclusion of the case. The Receiver seeks
13 interim payment of 90% of the fees incurred during the initial 14 weeks of the case. The 10%
14 holdback gives the Court flexibility in approving final fees, and helps ensure that interim fees do
15 not exceed the final fee award.

16 The Receiver is not being paid more than Mr. Feathers was paying himself. The Fee
17 Application covers work performed by the Receiver and his staff and, as discussed above, the
18 requested fees are far less than what Mr. Feathers would have paid himself and the Receivership
19 Entities' employees over the same period of time.

20 V. LETTER FROM MS. WU

21 The letter from Ms. Wu asks whether the fees requested are reasonable, whether there is a
22 standard rate for receivers, and whether there is set time frame for completing receivership tasks.
23 Docket No. 145. The reasonableness of the requested fees is discussed in the Fee Application and
24 above. There is no standard rate for receivers. Receivers have different levels of skill and
25 expertise. More skilled and experienced receivers charge more per hour than less skilled and
26 experienced receivers, the higher level of skill and experience allowing them to complete
27 receivership tasks in less time. Thomas Seaman is a highly skilled and experienced receiver,
28 having managed approximately 370 receiverships over 25 years. The blended hourly rate for the

1 Receiver's requested fees is \$226, which is very reasonable, especially considering the Receiver's
2 skill and experience.

3 Similarly, there is no set time table for completing receivership tasks. The time required to
4 complete receivership tasks varies greatly depending on the amount of work and complexity
5 involved. The Receiver completes tasks as efficiently as possible. His activities and progress are
6 described in his reports and monitored by the Court.

7 **VI. LETTER FROM THE JEFF AND JANE SHEN TRUST**

8 The Jeff and Jane Shen Trust ("Shen Trust") questions whether the requested fees are
9 reasonable. The Shen Trust states that "upon examination of the breakdown of the fees charged,
10 we noticed that many of the charges are in excess of \$400-\$648 per hour." The Shen Trust does
11 not identify any specific time entries or charges. The Receiver bills his time at \$375 per hour
12 (which is a discounted rate) and bills his staff at considerably less depending on their level of skill
13 and experience. As discussed above, the blended hourly rate for the Fee Application is \$226.

14 The Shen Trust also asserts that the "remaining funds" should not "take another large hit
15 before we get to see anything in return." To the contrary, since his appointment, the Receiver has
16 reversed the negative cash flow of the Receivership Entities and the companies are now cash flow
17 positive. Prior to the Receiver's appointment, the monthly returns promised to investors were
18 \$309,600 and the monthly payroll and related expenses were approximately \$258,000. The gross
19 interest and servicing income were only \$196,000. The pre-receivership loss of cash each month
20 was an unsustainable condition that would had led to vastly larger losses had the Receiver not
21 been appointed and operating expenses significantly reduced.

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VII. CONCLUSION

For the foregoing reasons, the Fee Application should be approved and amended proposed order submitted herewith should be entered.

Dated: December 27, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ Ted Fates
TED FATES
Attorneys for Receiver Thomas A. Seaman