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

12 SECURITIES AND EXCHANGE
13 COMMISSION,

14 Plaintiff,

15 vs.

16 SMALL BUSINESS CAPITAL CORP.;
MARK FEATHERS; INVESTORS PRIME
17 FUND, LLC; and SBC PORTFOLIO FUND,
LLC,

18 Defendants.

Case No. 5:12-CV-03237-EJD

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANT MARK
FEATHERS' REQUEST FOR A COURT
ORDERED AMENDMENT TO THE
ORDER AND INJUNCTION AND MOTION
FOR A REQUIREMENT FOR THE
RECEIVERSHIP ESTATE TO ENJOIN A
LEGAL ACTION (Dkt. No. 156)**

Date: February 22, 2013
Time: 9:00 A.M.
Place: Courtroom 4, 5th Floor
(Hon. Edward J. Davila)

1 Plaintiff Securities and Exchange Commission (“Commission”) opposes the motion of
2 defendant Mark Feathers (“Feathers”) to have the Court instruct the receiver to join ongoing
3 litigation captioned *Fortune Capital LLC, et al, v California Business Bank, et al*, Case No.
4 2:12-cv-10889-ODW, pending in the United States District Court for the Central District of
5 California. Feathers has not provided an adequate basis for the Court, or the receiver, to make a
6 reasoned decision concerning the merits of the motion, which involves expenditure of
7 receivership assets for legal fees to plaintiff’s counsel. While Feathers claims legal fees “are
8 estimated at \$125,000 or less” (Motion at 2), he provides no basis for that estimate, and does not
9 even identify the law firm to be paid, the billing rates to be charged, or the expected hours or
10 tasks to be accomplished. For these reasons alone, the Court should deny the motion.

11 Defendant’s motion shows that the lead plaintiff’s law firm in the suit is Pahl & McCay.
12 Stephen D. Pahl, a principal of that firm, filed an opposition to the receiver’s fee application
13 which stated that his firm had been retained by Feathers “several years ago” to represent
14 defendant and his company. (*See* Declaration of Stephen D. Pahl and Opposition to Interim Fee
15 Application Approval and for Payment of Compensation to Receiver and Professionals (Dkt. No.
16 150) at ¶ 3.) Thus, it appears that the requested payment of legal fees may be to the benefit of a
17 business associate of Feathers. Under such circumstances, a request to disburse substantial
18 assets from the receivership estate should be well supported and carefully scrutinized.

19 The Preliminary Injunction specifically addresses the situation raised by Feathers’
20 motion, and provides that the receiver may employ attorneys to investigate and, where
21 appropriate, to institute claims that may exist. (Preliminary Injunction (Dkt. No. 34) ¶ VII.) The
22 Commission understands that Feathers has brought this matter to the attention of the receiver
23 and his counsel. Before the receiver and the Court make any decision, it is advisable to have the
24 receiver investigate the factual basis for any claim, as well as potential defenses. Here, it is
25 unknown based on Feathers’ filing whether he had an opportunity to perform due diligence
26 before he invested that might differentiate him from plaintiffs in the filed action. In addition, the
27 Commission understands that Feathers became a member of the Board of Directors of California
28 Business Bank shortly after he used IPF funds to purchase shares. These, and other facts, should

1 be investigated so that an informed recommendation can be made to the Court concerning
2 whether receivership assets should be expended to pursue litigation against a third party.

3 Defendant's motion fails to provide a sufficient record for the Court to order the receiver
4 to make a substantial disbursement of funds, particularly where the motion does not even
5 identify the proposed recipient of the funds. Defendant's motion should be denied.

6
7 DATED: January 17, 2013

Respectfully submitted,

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9
10 /s/ Susan F. Hannan

John B. Bulgozdy

Susan F. Hannan

Attorneys for Plaintiff

SECURITIES AND EXCHANGE COMMISSION

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648
Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On January 17, 2013, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANT MARK FEATHERS' REQUEST FOR A COURT ORDERED AMENDMENT TO THE ORDER AND INJUNCTION AND MOTION FOR A REQUIREMENT FOR THE RECEIVERSHIP ESTATE TO ENJOIN A LEGAL ACTION (Dkt. No. 156)** on all the parties to this action addressed as stated on the attached service list:

OFFICE MAIL: By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

HAND DELIVERY: I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

UNITED PARCEL SERVICE: By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

ELECTRONIC MAIL: By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

E-FILING: By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

FAX: By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: January 17, 2013

/s/ Javier Delgadillo
Javier Delgadillo

1 **SEC v. SMALL BUSINESS CAPITAL CORP, et al.**
2 **United States District Court – Northern District of California**
3 **San Jose Division**
4 **Case No. 5:12-CV-03237-EJD**
5 **LA-4141**

6 **SERVICE LIST**

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11 ***Pro Se Defendant Mark Feathers***

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17 ***Attorney for Receiver Thomas Seaman over Defendants Small Business Capital***
18 ***Corp.; Investors Prime Fund, LLC; And SBC Portfolio Fund, LCC***

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