

1 Mark Feathers, *Pro Se*, Defendant
markfeathers@sbcglobal.net
1520 Grant Rd.
2 Los Altos, CA 94024
Telephone: (650) 776-2496
3 Facsimile: (650) 961-2382

Filed

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

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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;)
16 and SBC PORTFOLIO FUND, LLC,)

17 Defendants.)
18)
19)
20)
21)
22)
23)
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25)
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27)
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Case No. 5:12-cv-03237-EJD

**DEFENDANT'S *EX PARTE* REQUEST
FOR TEMPORARY RESTRAINING
ORDER AND INJUNCTION AGAINST
PLAINTIFF'S USE OF THE WORD
"PONZI", AND AN ORDER FOR THE
IMMEDIATE DISCONTINUATION OF
ITS POSTINGS OF THE WORD
"PONZI"**

C

1 **I Cause For Relief for *ex parte* Request for TRO and Injunction on Plaintiff**

2 Prior to this new *ex parte* request, *pro se* defendant Feathers requested a TRO and
 3 Injunction against the Plaintiff for its employment of *fighting words*. The requested was denied by
 4 the Court (Docket 143) due to Feathers' failure to meet the legal standards for a TRO and
 5 Injunction. Since the time of his earlier requests, facts and evidence have come to light which were
 6 not known at the time of the earlier request for a TRO and Injunction. These new facts and
 7 evidence clearly show that the legal requirements for a TRO and an injunction have been met.

8 These facts are:

- 9
- 10 1. Feathers has received threat of bodily harm
 - 11 2. Plaintiff has admitted to using a formula in their financial calculations which has caused
 - 12 an invalidation of all financial illustrations which they have made in their complaint
 - 13 against defendants Investors Prime Fund, LLC, and SBC Portfolio Fund, LLC (Court
 - 14 Dockets 126, 180, 181, and 187), and which are essential elements to their complaint.

15

16 Plaintiff, the United Securities and Exchange Commission, within its complaint in the
 17 matter of SEC v. Mark Feathers, and now in its own admission of how it did so¹, grossly overstated
 18 the actual income distributions of Feathers' investment funds for a two year period by more than
 19 fifty percent (" $> 50\%$ "), or over-stated them by more than \$1,000,000 during this period. Plaintiff
 20 is federal agency that plays a key oversight role in accounting matters for publicly traded
 21 companies worth trillions of dollars in value. Plaintiff could not accidentally or in good faith²
 22 make such gross overstatements of the actual and documented income distributions of the funds.
 23 Plaintiff's actions in grossly overstating the income distributions of Investors Prime Fund, LLC,

24 _____
 The Commission does not dispute that in calculating member returns in the Complaint, it

25 ¹Plaintiff's admission: added together the line items "distributions" and "re-invested distributions" to arrive at the total

26 ²In its reply to the motion (Dockets 160 and 161), plaintiff makes reference seven times or more to its "good
 27 faith" efforts. Such term was never outlined prior to the court as any factual basis of their illustrations for
 28 Plaintiff's *prima facie* showing to the court; fraud charges are to include facts as their evidentiary basis.

1 and SBC Portfolio Fund, LLC, were made knowingly and deliberately. In addition, Plaintiff was
2 fully aware of this matter of its false financial illustrations, and it has employed scienter in
3 presenting these false illustrations to the court in its sealed *ex parte prima facie* request to the court,
4 which was done in order to justify a request for an order and an injunction against the defendants,
5 and all as false pretense to the court in their lawsuit. In its reply to Feathers FRCP 12(b)(6) motion
6 to dismiss (Docket 126) plaintiff was forced to acknowledge that it employed a fabricated formula
7 in its financial illustrations:

$$8 \qquad \qquad \qquad \text{Distributions} = \text{Distributions} + \text{Reinvested Capital}$$

9 Plaintiff, and plaintiff's certified public accountants, who are Roger Boudreau and others
10 with the Commission, could not accidentally miss its employment of such an invalid formula.
11 Plaintiff has employed more than a ruse on the court, or a dubious formula, and indeed, the court
12 may even determine that this has been fraud on the court by the Plaintiff.

13 Plaintiff used their fabricated formula, and the false results which it produced, as the,
14 foundation in the complaint to its accusations that the funds were a Ponzi scheme, and in its public
15 proclamations and making its claims that they required new member capital to make their
16 payments.

17 Based upon the fact of the admission to Plaintiff's employing a false formula, and the harm
18 that the word Ponzi has caused onto Feathers, including written threats of bodily harm unto him,
19 defendant will show further herein and with the attached Points of Memorandum and
20 Understanding that defendant's request meets the legal requirements required for requested relief
21 for a TRO and Injunction prohibiting its use of the *fighting word* "Ponzi". Feathers will show
22 herein that this request demonstrates that it has met the proper legal standard for injunctive relief,
23 and that (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm
24 in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an
25 injunction is in the public interest." Stormans, Inc., v. Selecky, 586 F.3d 1109, 1127 (9th Cir.
26 2009).

27
28

1 **II Background**

2 This lawsuit was initiated under seal by an *ex parte* action of Plaintiff, who is the U.S.
3 Securities and Exchange Commission, on the basis of a *prima facie* showing of cause by plaintiff,
4 and as the basis for charging Mark Feathers and other defendants with securities fraud charges, and
5 accusations of scienter against Feathers, and has included very public accusations by Plaintiff that
6 Feathers was running Ponzi scheme.

7 In the attached Points of Memorandum and Understanding, Feathers will show how these
8 establish that the legal standard for injunctive relief has been met. Upon establishment of such,
9 Feathers asks the court to direct the Plaintiff to discontinue its unlawful postings of the *fighting*
10 *word* "Ponzi". With Plaintiff's admission of employing a false formula, this will not undue the fact
11 that the word "Ponzi" will always follow Feathers for the rest of his life on the internet and in
12 printed matters available to the public.

13 Immediate injunctive relief will at least serve to lessen the damage of these on Feathers, and
14 along with Plaintiff's admission of its false formula which it employed as the basis and pretense for
15 these accusations against Feathers. The balance of equities must tip in the favor of Feathers to this
16 request, with Plaintiff's admission of its formula which led to fabricated evidence. Additionally, an
17 injunction is in the public interest, because the public, and not just Feathers, is harmed by the bad
18 faith actions of Plaintiff or any government agency in its employment of the word "Ponzi", and
19 which offers no valid means of demonstrating facts to support its cause.

20 "Ponzi" is a harmful word that causes incitement, in particular in this era of history due to
21 the recency of the Madoff scandal and some \$50 billion of investor losses which occurred. The
22 public has great mistrust, fear, and loathing of any matters that include references to the word
23 "Ponzi". The word "Ponzi", when used carelessly, recklessly, or deliberately, such as Plaintiff has
24 done, harms all of society. This word, when used inappropriately, such as Plaintiff has done in its
25 lawsuit and in its postings, is of no value, and is in fact harmful, in the disposition of ideas, facts,
26 and beliefs. Plaintiff's own admission of employing a fabricated formula must be broadly known
27 by the public if they are to be able to be in a position of knowledge, and to protect themselves
28 against such possible bad faith actions of the Commission in the future.

1 **III Specific Supporting Facts in Defendant's Requested Cause for Relief**

2 *Pro se* defendant Feathers has received threats of bodily harm, or worse. A police report on
 3 this matter has been filed with the Los Altos police department, under Incident No. 130024 0126.
 4 Feathers' has never received such a similar threat ever before from an investor in his funds. The
 5 threat is due entirely, in his belief, to Plaintiff's use of the word "Ponzi" in their lawsuit and in their
 6 press releases. The close dates of proximity of the Plaintiff's press release and of this threat lends
 7 further validity to Feathers' assertion that Plaintiff's actions have led to incitement.

8 On the date of this request, which is February 5th, 2013, typing in the words "Mark Feathers
 9 Ponzi" on the Bing internet search engine produces a stupendous 27,900 citations. Such is the
 10 impact that this word has, and which must be acknowledged by Plaintiff and the court. It is a word
 11 with such power that it causes information, whether true or false, to spreads like an internet virus.

12 mark feathers ponzi

13 27,900 RESULTS

14 **SEC Shuts Down \$42 Million Ponzi-Like Scheme**

www.sec.gov/news/press/2012/2012-125.htm

15 **SEC Shuts Down \$42 Million Ponzi-Like Scheme FOR IMMEDIATE** Ponzi-like
 16 scheme operated by Small Business Capital Corp. and its principal Mark Feathers. ...

17 **Another Day Another Ponzi | Investor's Watchblog**

investorswatchblog.com/blog/investorswatchblog/?p=8800

18 The Securities and Exchange Commission announced today that it has obtained an
 19 emergency court order to halt an alleged Ponzi ... and its principal Mark Feathers ...

20 **Los Altos Town Crier - SEC accuses Los Altos firm of Ponzi scheme**

www.losaltosonline.com/index.php?option=com_content&task=view&id=...

21 The Securities and Exchange Commission last week froze assets of a Los Altos
 22 company, Small Business Capital Corp., after alleging that CEO Mark Feathers ...

23 **Courthouse News Service**

www.courthousenews.com/2012/06/29/47920.htm

24 SAN JOSE (CN) - The SEC said it obtained an emergency court order to stop a \$42
 25 million Ponzi scheme that 48-year-old Los Altos resident Mark Feathers ran through ...

26 **SEC Shuts Down \$42 Million Ponzi-Like Scheme**

www.fm-mag.com/news/sec-shuts-down-42-million-ponzi-like-scheme

27 The SEC obtained an emergency order today to shut down a company operating a
 28 Ponzi-like scheme that raised \$42 million. In reality, SBC founder and CEO Mark
 Feathers ...

Ponzi Scheme - Florida Fraud and Mismanagement FINRA

www.floridastockfraudblog.com/2012/06/ponzi-scheme-florida-fraud

SEC Shuts Down \$42 Million Ponzi-Like Scheme ... halt an alleged Ponzi-like scheme
 operated by Small Business Capital Corp. and its principal Mark Feathers. ...

Small Business Capital Corp., et al. Lit. Rel. No. 22406 / June

www.sec.gov/legation/litrelases/2012/22406.htm

SEC SHUTS DOWN MORTGAGE FUND PONZI-LIKE SCHEME. Home | Previous
 Page: U.S. SECURITIES AND EXCHANGE COMMISSION ... and its principal Mark
 Feathers (Feathers).

SEC Shuts Down Los Altos-Based SB Capital - Los Altos, CA Patch

losaltos.patch.com/articles/sec-shuts-down-los-altos-based-sb-capital

Securities regulators say the company and its principal, Mark Feathers were operating
 a Ponzi-like scheme, and one SB Capital fund even sold mortgages to another of ...

1 2 3 4 5 Next

1 Further, Feathers may continue to receive such threats with Plaintiff's continued use of the
2 *fighting word* "Ponzi". Use of this word is much more than a matter of libel; it is a *fighting word*
3 that has irrefutably caused incitement in the public. *Fighting words* are described as follows within
4 this public definition from Wikipedia:

5 "Fighting words are written or spoken words, generally expressed to incite hatred or violence from their target."

6 The "target" of Plaintiff is certainly the general public, as well as Feathers, and as
7 evidenced by Plaintiff's highly public initial and continued posting of this legal matter for the past
8 seven months and through this date on the "Ponzi" section of its web site up and through the date
9 of this *ex parte* request to the court, and despite its admission of its use of a formula in its
10 calculations which invalids all of its financial illustrations (Court Dockets 126, 160, and 187):

11
12 SEC Enforcement Actions Against Ponzi Schemes

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U.S. Securities and Exchange Commission

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14
15
16 **SEC Enforcement Actions Against Ponzi Schemes**

17 <http://www.sec.gov/spotlight/enf-actions-ponzi.shtml>
18 SEC Enforcement Actions Against Ponzi Schemes

2/3/2013
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19
20 Mark Feathers - SEC shut down a \$42 Million Ponzi-like scheme in which a San
21 Jose area man promised high returns for investors in two mortgage investment
22 funds but paid them in part with money from new investors.

23 As evidenced by their internet postings and press releases, Plaintiff clearly employs this
24 word for the public to hear, and for their own benefit, by either subtly or directly inciting the public
25 to stand behind the cause of their mission(s). Plaintiff has knowledge, or should have knowledge,
26 that occasionally somebody may be incited to violence upon gaining knowledge that the SEC
27 accuses a party of being a Ponzi and who has managed their investment, upon hearing these words.
28

1 When Plaintiff is careless or recklessness with a factual basis to its allegations, or even is
2 employing the standard of “good faith” efforts, which are not enough in a fraud accusation, and
3 when scienter is accused, and when this word is used, the highest care must be taken in
4 consideration of the impact which this word will cause. Plaintiff is fully aware of these matters.

5 Plaintiff, by way of its admission of employing a false formula, which led to grossly invalid
6 results in its financial illustrations, all of which it knew when it submitted these matters to the
7 court, has failed to meet a proper standard to justify its employment of this *fighting word*, which
8 can, and has, had devastating impact on its victims.

9

10 **IV Irrefutable Facts and Evidence Provided to the Court of Plaintiff’s Employment of a**
11 **False and Misleading Financial Illustrations in its Complaint and Accusations**

12 In his FRCP 12(b)(6) Motion to Dismiss and in Plaintiff’s reply (Court Docket 126, 160,
13 161, and 187) Feathers provided the court with irrefutable evidence that Plaintiff employed a
14 formula within its calculations which overstated the income distributions of Feathers’ investment
15 funds by more than fifty percent.

16 Plaintiff, in their reply has acknowledged the matter of their employment of this formula.
17 Plaintiff employed, not by accident, a formula that could never be used to produce proper financial
18 illustrations. Plaintiff is now, and was fully aware prior, of this matter of an inappropriate formula,
19 as Plaintiff is the SEC, with many, many CPAs. Plaintiff’s formula allowed them to create an
20 unlawful false pretense to their lawsuit, and Plaintiff used their formula, clearly, as the instrument
21 of their *unlawful will*.

22 Plaintiff is the SEC. “Good faith” is not the basis for a *prima facie* showing to a court of
23 law. Plaintiff has caused to be seized from the defendants approximately \$45,000,000 of capital,
24 all while knowing of the false formula which they employed.

25 When challenged on this matter by Feathers’ irrefutable evidence in his Motion to Dismiss,
26 plaintiff’s only possible reply (Docket 160), could be, and was, to admit using their false formula.
27 This formula was used by plaintiff for all, or substantially all, financial illustrations within the
28 complaint, including some twenty two paragraphs or more which incorporate direct reference to

1 illustrations which employed this formula, and which are outlined further within the in
2 accompanying Points of Memorandum and Understanding. Plaintiff did not make this admission to
3 the court of employing this formula on a voluntarily basis, nor did it show their formula to the court
4 in the submission of this lawsuit. Plaintiff, hid and or obscured any direct or indirect reference to
5 this formula from the court in their complaint and submissions.

6 Plaintiff continues to use the word "Ponzi" time and again in the court replies, in
7 inflammatory and inciting methods. This must be all be put to a stop,. Plaintiff will abide only by
8 the order of a court, and not to any other authority on a voluntary basis. Wikipedia's definition of
9 *fighting words* states further:

10
11 "The difference between incitement and fighting words is subtle, focusing on
12 the intent of the speaker. Inciting speech is characterized by the speaker's intent
13 to make someone else the instrument of his or her unlawful will. "

14
15 Defendant has shown cause, and asks the court for injunctive relief in these matters.
16 Plaintiff must not be allowed to continue to use the word "Ponzi", and must take down its postings.

17
18 **V Points of Memorandum and Understanding**

19 The accompanying Memorandum and Points of Understanding will further demonstrate to
20 the court very clearly that the standards have been met for an Order and Injunction. Defendant has
21 outlined in the accompanying Memorandum of Points & Authorities cause for "extraordinary
22 remedy" that may be only awarded upon a clear showing that the moving party is entitled to such
23 relief. Winter v. Natural Res. Def. Counsel, Inc., 555 U.S. 7, 22 (2008). The standard for issuing a
24 TRO and preliminary injunction are the same. See New Motor Vehicle Bd. Of Cal. V. Orrin W.
25 Fox Co., 434 U.S. 1345, 1347 n.2 (1977). These standards are:

26 After its review of these materials, Defendant respectfully asks the court to now reconsider
27 a temporary restraining order and injunction against plaintiff's future use of *fighting words*.

28

1 The defendant makes this application pursuant to rule 65 of the Federal Rules of Civil
2 Procedure, Civil L.R. 65-1, and Civil L.R. 7-10. The defendant is authorized to make this
3 application, and the Court is authorized to grant a temporary restraining order and other equitable
4 relief. This application is filed *ex parte* because, as prior, plaintiff has not acknowledged its First
5 Amendment Violations to defendant, nor has withdrawn its postings from its web site.

6 Feathers did ask the Commission to discontinue their "Ponzi" postings, and of his
7 intentional of his intention to file this motion due to the need for relief, and based upon the threat
8 which he has received of bodily harm, and because Plaintiff has admitted to their use of a formula
9 which could only lead to invalid financial illustrations. The Commission declined Feathers
10 requests to re-consider its position on these matters.

11 This application is supported by the defendant's Memorandum of Points and Authorities.

12
13 Dated February 5th, 2013

14 Respectfully submitted,

15 
16 Mark Feathers

17 *Pro Se* Defendant
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1 This matter came to be heard upon the *Ex Parte* request of *Pro se* defendant Mark Feathers.
2 The court, having heard the defendant's argument and other evidence finds that:

- 3
- 4 A. This Court has jurisdiction over the parties to, and the subject matter of this action.
- 5
- 6 B. Good cause exists to believe that *pro se* defendant Feathers has established, through this
7 motion to the court, and in the Memorandum of Points and Authorities, there to be
8 cause to question the constitutional basis of the plaintiff's actions in its use of *fighting*
9 *words* and in its postings of those charged with civil actions which incorporate the
10 *fighting word* "Ponzi".
- 11
- 12 C. Good cause exists to believe that it is appropriate and in the interests of justice that *pro*
13 *se* defendant Feather's request for an immediate injunction and restraining order for
14 plaintiff to discontinue its postings and its use of the *fighting word* be awarded.

15 IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this action for the
16 purpose of implementing and carrying out the terms of all orders and decrees which may be entered
17 herein and to entertain any suitable application or motion for additional relief within the
18 jurisdiction of this Court.

19
20 IT IS SO ORDERED.

21
22 DATED: February ____, 2013

23 TIME:

24 _____
EDWARD J. DAVILA

25 UNITED STATES DISTRICT JUDGE

26 Presented by:

27 Mark Feathers, as *Pro Se* Defendant
28