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

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANT MARK
FEATHERS' MOTION AND AMENDED
FRCP 12 MOTION TO DISMISS THE
LAWSUIT, MOTION TO INSTRUCT
RECEIVER TO DISCONTINUE FORENSIC
WORK AND MOTION TO DISMISS THE
RECEIVER AND INVALIDATE ALL
PRIOR REPORTS TO THE COURT, FRCP
11 MOTION FOR SANCTIONS AGAINST
THE PLAINTIFF'S OFFICERS JOHN
BULGOZDY AND SUSAN HANNAN (Dkt.
Nos. 273 & 274 & 275)**

Date: May 10, 2013
Time: 9:00 A.M.
Place: Courtroom 4, 5th Floor
(Hon. Edward J. Davila)

1 Plaintiff Securities and Exchange Commission (“Commission”) opposes the most recent
2 motion of defendant Mark Feathers (“Feathers”) which again asks the Court to dismiss the
3 Commission’s Complaint pursuant to Fed. R. Civ. P. 12, instruct the Receiver to discontinue
4 forensic work and to dismiss the Receiver and invalidate all prior reports to the Court, and for
5 Fed. R. Civ. P. 11 sanctions against counsel for the Commission, John Bulgozdy and Susan
6 Hannan. *See* Dkt. Nos. 273 (motion), 274 (amended motion), and 275 (second amended
7 motion).

8 Feathers’ motion is based on a single statement in the Recommendation by Plaintiff
9 Securities and Exchange Commission That Thomas A. Seaman Be Appointed Receiver, filed
10 June 21, 2012. *See* Dkt. No. 6. In that filing, the Commission recommended that Mr. Seaman
11 be appointed by the Court as an independent receiver over the entity defendants. In support of
12 that recommendation, the Commission attached a copy of Mr. Seaman’s qualifications and a
13 letter setting forth additional information for the Court’s consideration. *Id.* The Commission
14 stated that it obtained proposals from two other qualified receiver candidates and offered to
15 provide those submissions to the Court, if the Court so desired. *Id.* at 1:16-18. The Commission
16 then stated three reasons why it recommended Mr. Seaman. *Id.* at 1:19-2:3. The third stated
17 reason was that in addition to being an experience receiver, “Mr. Seaman is a licensed CPA and
18 has extensive experience operating and resolving distressed businesses, and these two
19 qualifications may be of substantial assistance to the Court in this matter.” *Id.* at :1:22-2:2.

20 It is only a portion of this last sentence – specifically the statement that Mr. Seaman is a
21 “licensed CPA” – that is the basis of Feathers’ motion. Feathers states that Mr. Seaman is not a
22 licensed certified public accountant, or “CPA.” Mr. Seaman is not a licensed certified public
23 accountant. As stated in Mr. Seaman’s curriculum vitae, Mr. Seaman is a highly qualified and
24 experienced licensed chartered financial analyst, or “CFA.” *Id.* at Ex. 1. Counsel for the
25 Commission believes that the reference to “CPA” was, regrettably, a typographical error. We
26 believe that we intended to state that Mr. Seaman was a “CFA.” Counsel for the Commission
27 apologizes for this typographical error.

1 However, this does not warrant dismissal of the Commission’s case, dismissal of the
2 Receiver, or imposition of sanctions upon counsel for the Commission. Mr. Seaman’s
3 qualifications were disclosed to the Court in Mr. Seaman’s curriculum vitae, attached to the
4 Commission’s recommendation, and in a letter proposal outlining his rates and how he would
5 proceed. *Id.* Ex. 1. Mr. Seaman’s resume states that he is “a former CFO and Controller, and is
6 a Chartered Financial Analyst (CFA).” *Id.* Mr. Seaman’s resume also states that he has “strong
7 accounting skills and experience as a financial analyst [which] have been beneficial in litigation
8 requiring reconstruction of books and records.” *Id.* Mr. Seaman’s qualifications include a
9 Bachelor of Science degree in finance from the University of Illinois in 1979, and a CFA license
10 obtained in 1993. *Id.* Mr. Seaman’s firm is licensed by the State of California as a Registered
11 Investment Adviser and as a California Real Estate Broker, and Mr. Seaman is a member of the
12 Institute of Chartered Financial Analysts, the Los Angeles Society of Financial Analysts, the
13 California Receiver’s Forum, the Orange County Bar Association as a non-lawyer, and is a
14 founding member of the National Association of Federal Equity Receivers. *Id.*

15 Mr. Seaman’s letter also provided information to the Court about his qualifications and
16 his billing rates. Mr. Seaman also outlined the “Scope of Work” that he anticipated performing.
17 Mr. Seaman also discussed professionals that he would hire, including the Allen Matkins law
18 firm, the accounting firm of Crowe Horwath if necessary, and Huron Consulting Group for
19 forensic computer work. *Id.*

20 In neither his letter nor his curriculum vitae does Mr. Seaman claim to be a certified
21 public accountant. *See id.* The Court should be confident that its Receiver did not provide any
22 misleading information to the Court. Counsel for the Commission did not intend to mislead the
23 Court through a typographical error. In addition, there is no requirement that a receiver be
24 licensed as a CPA, and in fact, many receivers in federal, and state, court actions are not CPAs.
25 In many instances, receivers employ outside accounting firms to provide accounting services at
26 substantial additional cost to the receivership estate. Mr. Seaman’s strong accounting skills and
27 experience as a financial analyst gives him the knowledge and experience to reconstruct books
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1 and records without employing an outside accounting firm, and therefore without burdening the
2 receivership estate with that added layer of expense.

3 Because the Court had Mr. Seaman's curriculum vitae and lengthy written proposal, the
4 Court had ample evidence to make a determination to appoint Mr. Seaman. A typographical
5 error in the Commission's filing does not support dismissal of the case, setting aside the
6 Receiver's work over the past several months, dismissal of the Receiver, or sanctions against
7 counsel for the Commission. Therefore, the Commission respectfully requests that Defendant
8 Feathers' motion to dismiss, and related motions, be denied in all respects.

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10 DATED: March 8, 2013

Respectfully submitted,

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13 /s/ John B. Bulgozdy _____

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 March 8, 2013, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANT MARK FEATHERS' MOTION AND AMENDED FRCP 12 MOTION TO DISMISS THE LAWSUIT, MOTION TO INSTRUCT RECEIVER TO DISCONTINUE FORENSIC WORK AND MOTION TO DISMISS THE RECEIVER AND INVALIDATE ALL PRIOR REPORTS TO THE COURT, FRCP 11 MOTION FOR SANCTIONS AGAINST THE PLAINTIFF'S OFFICERS JOHN BULGOZDY AND SUSAN HANNAN (Dkt. Nos. 273 & 274 & 275)** 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: March 8, 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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17 ***Attorney for Receiver Thomas Seaman over Defendants Small Business Capital***
18 ***Corp.; Investors Prime Fund, LLC; And SBC Portfolio Fund, LCC***