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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;)
and SBC PORTFOLIO FUND, LLC,)
16)
17 Defendants.)
18)
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Case No. 5:12-cv-03237-EJD

**OPPOSITION ON RECEIVER'S
MOTION FOR
ADMINISTRATIVE RELIEF
(DOCKET 322)**

**REQUEST FOR ORAL
ARGUMENTS**

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3 **Introduction and Arguments**

4 The receiver and his counsel have lost the right to represent the receivership estate in a
5 lawsuit against California Business Bank. Their motive to ask for authority now must be
6 questioned. Their motion even states the following wording:

7 "The receiver seeks authority to sue CBB in an abundance of caution..."

8 So the receiver does not even indicate that this is to recover the fund's investment, it's just
9 "an abundance of caution". Yet they indicate that engagement of their counsel on this matter may
10 cost in excess of \$100,000. The receiver's reasoning does not stand.

11 The receiver and his counsel show the court an outline of their proposed complaint against
12 the bank, but they have not provided any supporting detailed narrative on their own work and
13 evaluations that forms the basis for their request. It is questionable if they have done proper
14 legwork on this lawsuit.

15 For example, one of their proposed "named defendants" is known to be deceased, and it
16 will be hard to sue him.

17 The complaint, in fact, seems to almost be a template of that used by another firm that had
18 offered the receiver and his counsel to join them in a lawsuit six months ago. The bank is in
19 regulatory distress; if the bank is closed, the FDIC will be in a first position on the bank's D & O
20 policy, which itself has been reduced by two-thirds since *pro se* defendant Feathers brought this
21 million dollar investment to the receiver and his counsel's attention (Exhibit A) more than nine
22 months ago. Feathers admin motion of six months ago requesting that the receiver enjoin a lawsuit
23 to recover this million dollar investment was sat on by the receiver and his counsel. Feathers filed
24 his own admin motion (Docket 316) on this matter a week ago, after failing to hear anything back
25 for weeks from the receiver and his counsel after the receiver's counsel was informed by Feathers
26 in a more recent email (Exhibit 2) that a settlement had been reached by parties who invited them
27 to join the lawsuit several months ago. The receiver and his counsel did not discover the matter of
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1 the settlement in the other lawsuit from their own efforts. In fact, receiver's counsel went as far as
2 asking Feathers to contact that party to find out the settlement terms, instead of doing it himself.

3 Now, hurriedly because they look bad from a quick settlement having been reached by
4 other plaintiffs against the bank, they have put together a lawsuit and draft complaint.

5 Unfortunately the receiver and his counsel will not be able to find out the terms of the settlement
6 now because of a confidentiality agreement on that matter. And if time is money, their indecision
7 has possibly cost the receivership estate substantial money – hundreds of thousands of dollars.

8 Additionally, the receiver and his counsel never informed Feathers, a former director of this bank,
9 and who would be perhaps the most witness in the matter of this lawsuit, with a phone call or even
10 an email, that they were about to submit an admin motion on this matter. Defendant supports the
11 idea of a lawsuit against this bank, but not one that is initiated by this receiver and this law firm as
12 his counsel.

13 Does this law firm have any expertise in California charter bank securities law? They may,
14 but the receiver's declarations accompanying the admin motion do not offer guidance on this
15 matter. However, as of six or seven months ago, defendant specifically recalls a conversation with
16 the receiver and his counsel wherein one or both professed that they did not even know what a bank
17 "call" (regulatory financial reporting forms) report is. Feathers was taken aback upon learning of
18 this matter, and that he was educating one or both on banking matters at the expense to the
19 receivership estate. In their page one footnote to their proposed order, the receiver's counsel states
20 that they would like to pursue claims against "CBB" in "an abundance of caution"? What, exactly,
21 does this mean; they indicate costs could go over \$100,000. They also reference in the footnote a
22 desire to make the court aware of "the potential recovery". The defendant has been trying to
23 demonstrate the matter this having more than "potential recovery" for a substantial period of time.

24 In ad additional sign of extreme hypocrisy, the receiver and counsel fail to provide the
25 following detail that they criticized Feathers for in their opposition months ago on this same matter:

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1 While Feathers claims legal fees "are
2 reasoned decision concerning the merits of the motion, which involves expenditure of
3 receivership assets for legal fees to plaintiff's counsel. While Feathers claims legal fees "are
4 estimated at \$125,000 or less" (Motion at 2), he provides no basis for that estimate, and does not
5 even identify the law firm to be paid, the billing rates to be charged, or the expected hours or
6 tasks to be accomplished. For these reasons alone, the Court should deny the motion.

7 They are even using Feathers' own prior expense estimate. Additionally, they criticized Feathers'
8 choice of counsel because it "benefitted a business associate". Apparently the same rules of benefit
9 don't matter for themselves:

10 150) at ¶ 3.) Thus, it appears that the requested payment of legal fees may be to the benefit of a
11 business associate of Feathers. Under such circumstances, a request to disburse substantial
12 assets from the receivership estate should be well supported and carefully scrutinized.

13 It should be added this "business associate" appears to have been successful in his goals,
14 and for his client, all in a very short period, whereas one can only speculate if receiver's counsel
15 will share this success.

16 Additionally, the receiver's counsel stated in their opposition to Feathers' prior motion:

17 Commission understands that Feathers became a member of the Board of Directors of California
18 Business Bank shortly after he used IPF funds to purchase shares. These, and other facts, should
19 be investigated so that an informed recommendation can be made to the Court concerning
20 whether receivership assets should be expended to pursue litigation against a third party.

21 There is no indication or support in the receiver's motion that he or his counsel
22 "investigated" these matters as per the recommendation of the SEC. Not once has Feathers even
23 been involved to help with the "investigation", although his role is readily apparent to be a crucial
24 one. The argument of the receiver below, additionally, shows another example of his attacks on the
25 defendant on minor issues, vs. on merit. Yet they have done an about face now.
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1 Defendant's motion fails to provide a sufficient record for the Court to order the receiver
2 to make a substantial disbursement of funds, particularly where the motion does not even
3 identify the proposed recipient of the funds. Defendant's motion should be denied.

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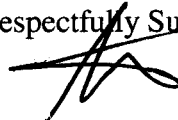
6 Plaintiff Securities and Exchange Commission ("Commission") opposes the motion of
7 defendant Mark Feathers ("Feathers") to have the Court instruct the receiver to join ongoing
8 litigation captioned *Fortune Capital LLC, et al. v California Business Bank, et al.* Case No.
9 2:12-cv-10889-ODW, pending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

16 Defendant asks if is appropriate right now to be caused onto the receivership estate a
17 possible substantial financial commitment with a lawsuit which will cause the engagement of the
18 receiver's counsel, or expand upon it, while a hearing on his dismissal is pending? Right now, in
19 fact, this admin motion looks more like either a self-employment continuation act, or the receiver's
20 and his counsel's belated attempt to cover themselves in the event of a future lawsuit against
21 themselves by the defendants for their lack of action, or both. Defendant asks that this matter be
22 stayed until at least the scheduled hearing for dismissal of the receiver is heard, which is just a few
23 weeks away, on May 10th, 2013.

24 **Conclusion**

25 The recommendation of the receiver should not be accepted for the reasons stated.

26 Respectfully Submitted,



27 Mark Feathers, *Pro Se* Defendant

28 Date: 4-27-13

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This matter came to be heard upon the request of *Pro se* defendant Mark Feathers.

The court, having heard the defendant's argument and other evidence finds that:

A. This Court has jurisdiction over the parties to, and the subject matter of this action.

B. Good cause exists to believe that *pro se* defendant Feathers has established, through this motion, there to be reasons to (1) deny the receiver's request for relief, and (2) to approve Feathers' request for oral arguments on this matter.

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

IT IS SO ORDERED.

DATED: _____, 2013

TIME:

EDWARD J. DAVILA

UNITED STATES DISTRICT JUDGE

Presented by:

Mark Feathers, as *Pro Se* Defendant