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

12 SECURITIES AND EXCHANGE
COMMISSION,

13 Plaintiff,

14 vs.

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

18 Defendants.

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

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
CONSOLIDATED RESPONSE TO THE
SECOND INTERIM FEE APPLICATIONS
OF THE RECEIVER AND THE
RECEIVER'S GENRAL COUNSEL, ALLEN
MATKINS LECK GAMBLE MALLORY &
NATSIS LLP [Dkt. No. 338, 339.]**

Date: July 5, 2013
Time: 9:00 a.m.
Place: Courtroom 4, 5th Floor
(Hon. Edward J. Davila)

1 **I. INTRODUCTION**

2 Plaintiff Securities and Exchange Commission (“Commission”) respectfully submits this
3 consolidated response to the Receiver’s Second Interim Fee Application (Dkt. No. 338) and the
4 Second Interim Fee Application of Allen Matkins Leck Gamble Mallory & Natsis LLP, General
5 Counsel to the Receiver (Dkt. No. 339). During the three months covered by the Second Interim
6 Fee Applications, the Receiver incurred fees of \$195,279.50, and seeks payment of 90% of that
7 amount, or \$175,751.55. Allen Matkins incurred fees of \$127,107.90 and expenses of \$1,404.65,
8 and seeks payment of 90% of fees, or \$114,397.11, and 100% of the requested expenses. The
9 Commission supports approval of the fee applications and payment of interim fees.

10 There is little doubt that defendant Mark Feathers – and perhaps some investors – will
11 oppose any interim payment to the Receiver or his counsel. Prior to the Receiver being
12 appointed, Feathers spent much more, on a monthly basis, on operating expenses than does the
13 Receiver, and Feathers was not generating sufficient net income to fund the payments of returns
14 he made to investors. The Receiver is continuing to operate the business, but has pared expenses
15 and suspended monthly payments to investors, with the result that the operations are cash
16 positive on that pared down basis. In his interim reports ordered by the Court, the Receiver has
17 also identified shortcomings with Feathers’ operation of the defendant entities. Feathers either
18 ignores or attacks these findings and challenges the Receiver at every turn. Indeed, Feathers
19 even opposes his own requests to have the Receiver take certain action. (*Compare* Dkt. No. 316
20 (Feathers’ motion to compel the Receiver to sue California Business Bank) with Dkt. No. 331
21 (Feathers’ opposition to the Receiver’s motion for leave to sue California Business Bank).)
22 However, that the Receiver is operating the defendant entities in a more rational and economical
23 manner is not a reason to deny payment of interim fees.

24 Moreover, the Receiver is being more economical than Feathers because the Receiver is
25 performing two separate jobs mandated by the Court, with lower expenses than those of
26 Feathers: (1) continued management and operation of defendant entities, and (2) Court-ordered
27 receivership functions such as performing a forensic accounting, managing the claims process,
28 providing interim reports, and seeking approval from the Court as appropriate for certain actions.

1 While Feathers opposes the payment of any interim fees, this essentially places the entire burden
2 for both categories of expenses on the Receiver and his counsel. However, Feathers offers no
3 good reason why the Receiver and his counsel should bear the expense of continued management
4 and operation of the defendant entities, and there is none. These entities had business expenses
5 prior to the Receiver's appointment, and they continue to have such expenses – although at a
6 much lower level due to the Receiver's prudent management. As they did before the Receiver
7 was appointed, the assets of the Receivership entities should continue to fund those expenses.
8 Indeed, to avoid imposing an economic hardship on persons who agree to act as court-appointed
9 receivers, well established case law provides for interim payments of such expenses from the
10 assets of the receivership.

11 With regard to the Court ordered receivership functions, these are functions that the Court
12 has directed the Receiver to take to assist the Court in its management of the assets of the
13 Receivership estate. The forensic accounting is perhaps the largest of these expenses in the
14 Second Interim Fee Application, amounting to over \$42,907.50 of the \$195,279.50 in total fees
15 incurred by the Receiver, or about 22% of the fees in the Second Interim Application. The
16 forensic accounting will provide assistance to the Court in its management of the Receivership
17 estate. The payment of interim fees for this accounting means that the Court-appointed Receiver
18 is not required to fund out of his own pocket the costs incurred for Court-ordered tasks. By the
19 time the Court hears this fee application, the Receiver and his counsel will have worked for
20 approximately a year on this matter, and this Second Interim Fee Application and the First
21 Interim Fee Application cover only half that period.

22 Defendant Feathers may point to a particular time entry, or part of a time entry, and take
23 issue with it. The Receiver and his counsel have submitted copious time entries documenting
24 their fees. If the entries had no relation to the matters at hand or showed complete disregard for
25 prudent management and waste of the assets of the Receivership, this would be cause for
26 objecting to an interim payment. That is not the case here. In their entirety, the Second Interim
27 Fee Applications show that the Receiver and his counsel are working diligently and prudently to
28 manage the defendant entities, that the overall fees are reasonable and necessary to the

1 management of the Receivership estate, and that the Receiver is performing the tasks mandated
2 by the Court. Accordingly, the Commission supports the Second Interim Fee Applications of the
3 Receiver and his counsel.

4 **II. DISCUSSION**

5 **A. The Court Has Discretion To Award Interim And Final Fees**

6 It is well established that the determination if and when to award fees and expenses to a
7 court-appointed receiver and the professionals employed by the receiver are within the Court's
8 sound discretion. *See Drilling & Exploration Corp. v. Webster*, 69 F.2d 416, 418 (9th Cir.
9 1934). The "compensation is usually determined according to the circumstances of the particular
10 case, and corresponds with the degree of responsibility and business ability required in the
11 management of the affairs" and the difficulty involved in that management. *Stuart v. Boulware*,
12 133 U.S. 78, 81-82, 10 S. Ct. 242, 33 L. Ed. 568 (1890). An award of interim fees may be
13 appropriate where a receiver or the professionals employed by the receiver "regularly devote[] a
14 portion of his time, either daily or weekly, to the administration of the estate[.]" *See In Re*
15 *McGann Mfg. Co.*, 188 F.2d 110, 112 (3d Cir. 1951) (interim fees to bankruptcy trustee or his
16 counsel). *See also In re Alpha Telecom, Inc.*, No. CV 01-1283-PA, 2006 WL 3085616, at *3 (D.
17 Ore. Oct. 27, 2006). Any award of interim fees is interim, as the Court ultimately sets the fee at
18 the conclusion of the receivership, and any fees awarded in the interim are subject to adjustment,
19 if appropriate, when the Court determines the final fee to be awarded at the close of the
20 receivership.

21 **B. An Award Of Interim Fees Is Appropriate**

22 **1. Interim Fees For Operations Of The Defendant Entities**

23 The Receiver is continuing to operate the defendant entities, with the attendant costs
24 involved in managing a business. The Receivership entities were incurring similar costs –
25 although at a much higher level – prior to the Receiver's appointment. The Receiver's Second
26 Interim Fee Application provides the Court with detailed information on those expenses by
27 breaking down charges by task. Tasks associated with the continued operation of the defendant
28 entities include costs similar to those incurred by the defendant entities before they were placed

1 into Receivership, such as A/R and other Debt Collections; Accounting and Reporting;
2 Bookkeeping; Construction Supervision; Manage Business; Project Management; Investor
3 Relations;¹ and Sell Liquidate Assets. (*See Receiver's Second Interim Fee Application at p. 5.*)
4 In connection with these normal costs of operation of a business, the Receiver employed the
5 services of counsel. Allen Matkins' fees for Sale of Assets/Dispositions and Investor
6 Communications qualify as the normal and usual operating expenses of the defendant entities.
7 (*See Allen Matkins Second Interim Fee Application at p. 2.*)

8 These were, and are, the normal and usual costs of operation of a business such as the
9 defendant entities. It was in part to pay such normal and usual operating costs that defendant
10 Feathers misappropriated over \$6 million of investors' money from the Funds. Fortunately for
11 the investors, the Receiver has been managing the assets of the Receivership entities on a more
12 prudent and economical basis. Rather than needing to dip into the investors' existing capital to
13 pay for operations, the Receiver's interim fees can be paid from cash being generated by the
14 estate. While the defendant entities are by no means "profitable," on a pared down basis and
15 without accounting for management costs or payments of returns to investors, they are at least
16 cash positive. Thus, the payment of interim fees will not further eat into the investors' capital, as
17 defendant Feathers was doing before the Receiver was appointed.

18 There is no basis to oppose payment of these normal operating costs from the assets of
19 the Receivership estate. The investors were paying such costs – although at a much higher dollar
20 cost per month and from their principal rather than cash generated by the assets, to defendant
21 Feathers and SB Capital before the Receiver was appointed. Indeed, the investors are better off
22 because the appointment of the Receiver and his prudent management has stopped the
23 dissipation of their capital, and will allow them to recover a large part of their investment.

24 There is no legal principle or reasonable justification for causing the Receiver and his
25 counsel to bear the ongoing operational costs of the Receivership entities. An award of interim
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27 ¹ Feathers spent a substantial amount on investor relations and advertising, including hosting
28 regular dinners for his investors. The Receiver is not incurring those types of expenses, but is
answering questions and responding to investor inquiries, which takes time and costs money.

1 fees is therefore appropriate to cover such costs, particularly here where the Receiver has been
2 prudently managing the business for the ultimate benefit of the defrauded investors.

3 **2. Interim Fees For Receivership Activities**

4 Separate and apart from the operation of defendant entities, the Receiver must also
5 perform those tasks mandated by the Court that are part of the duties of a Receiver. These
6 include the forensic accounting, receivership administration, and the cost of the Receiver's time
7 and a paralegal to assist in this litigation. (*See* Receiver's Second Interim Application at p. 5.)
8 The Receiver must, and does, submit periodic reports to the Court detailing his activities, as well
9 as filing motions and other legal papers as necessary to obtain Court approval as appropriate for
10 certain actions the Receiver believes are in the best interests of the Receivership estate. In this
11 case, as discussed in the Receiver's various filings, the Receiver also incurs costs responding to
12 various motions and papers submitted by defendant Feathers. It is well established that such
13 normal and usual costs of a receivership are borne by the receivership estate. Again, it would be
14 unfair to expect a Court appointed Receiver to bear such costs out of his or her own pocket,
15 particularly where the estate has assets and the Receiver is working prudently and economically.

16 The Receiver incurs legal fees in performing these Receivership duties. In Allen
17 Matkins' fee application, these are categorized as Investigation/Reporting; Pending Litigation;
18 Claims; Third Party Claims; and Employment/Fees. (*See* Allen Matkins Second Interim
19 Application at p. 2.) As outlined in the Second Interim Fee Applications, the Receiver performs
20 many functions himself in an effort to control expenses. In this case, defendant Feathers has
21 filed numerous motions challenging almost every action taken by the Receiver and attacking the
22 qualifications and competence of Mr. Seaman. Mr. Seaman must respond to each of Feathers'
23 filings, not only to clarify the record for the Court, but also to provide the Court with reliable
24 information it can use as a basis for management of the Receivership estate. However, it takes
25 the Receiver and his counsel time, which translates into fees, to respond to Feathers' multiple
26 filings. On the one hand, Feathers files numerous motions that require a response and increase
27 the costs of administration of the Receivership estate, and then on the other hand, Feathers
28 objects to any payment to the Receiver and his counsel in responding to the motions.

1 An examination of the overall tasks performed and fees incurred show that Mr. Seaman is
2 managing the receivership tasks in a prudent and economical manner. The Second Interim Fee
3 Application shows that the Receiver has been working diligently on these tasks for the benefit of
4 the Court and the defrauded investors. The detailed expenses show that the persons working
5 with the Receiver to run the defendant entities and perform the Court-mandated tasks are
6 operating conscientiously as careful business people doing a job.

7 **III. CONCLUSION**

8 The Commission supports approval of the fees and expenses requested in the Second
9 Interim Fee Applications of the Receiver and his general counsel, Allen Matkins.

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12 DATED: April 18, 2013

Respectfully submitted,

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14 /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 April 18, 2013 I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S CONSOLIDATED RESPONSE TO THE SECOND INTERIM FEE APPLICATIONS OF THE RECEIVER AND THE RECEIVER'S GENRAL COUNSEL, ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP [Dkt. No. 338, 339.]** 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: April 18, 2013

/s/ Sarah Mitchell
Sarah Mitchell

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**

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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, LLC***

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