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Richard W. Wiekling
Clerk, U.S. District Court
Northern District of California
San Jose

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

12 SECURITIES AND EXCHANGE
13 COMMISSION,)
14 Plaintiff,)
15 vs.)
16 SMALL BUSINESS CAPITAL CORP.; MARK)
17 FEATHERS; INVESTORS PRIME FUND, LLC;)
18 and SBC PORTFOLIO FUND, LLC,)
19 Defendants.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

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

F.R.C.P. Rule 12(b)6 Motion to Dismiss
F.R.C.P. Request for Rule 11 Sanctions
against Plaintiff

1 **Motion**

2 This is an *ex parte* F.R.C.P. Rule 12(b)6 emergency motion for *sue sponte* dismissal of the
3 lawsuit for cause, and for plaintiff's use, and introduction of, inadmissible evidence.

4 Defendant's prior request to the court for legal fees was turned down, in whole or in part,
5 from the inadmissible evidence, and defendant asks the court to consider other F.R.C.P. Rule 12(b)
6 issues of procedure that may be applicable.

7 Defendant asks the court to impose F.R.C.P. Rule 11 sanctions against plaintiff for
8 employing the use of inadmissible evidence, knowingly doing so, and which has caused a violation
9 of defendant's legal due process privileges, as well as other serious harm to the defendants.

10 **Background**

11 Plaintiff filed lawsuit based upon a *prima facie* showing of information to support its
12 accusations of securities law violations by the defendants.

13 Defendant Feathers is a career SBA lender, managing businesses which are primarily
14 engaged in SBA guaranteed small business lending operations in California and around the United
15 States, by way of special licensing granted to them by the federal government, and, for the past
16 seven years, Feathers has managed pooled mortgage (non-bank lender) investment funds. The
17 funds, Investors Prime Fund, LLC ("IPF") and SBC Portfolio Fund, LLC ("SPF"), Small Business
18 Capital Corp. (SB Capital) are located and headquartered in Los Altos, California.

19 **Argument**

20 In its August 10th, 2012, letter to the court, plaintiff included privileged attorney-client work
21 as "Exhibit B". Plaintiff's attorney describes this, falsely, as being "non-privileged" as follows:

22
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25 August 10, 2012
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27 Feathers' assertions about attorneys are directly contradicted by a non-privileged letter
28 produced to the Commission by IPF's independent outside auditor. An April 24, 2012 letter from

1 Plaintiff obtained this information from its subpoena of defendant's public accountants.
2 The established legal basis for considering this letter to have had attorney-client privilege includes
3 the following citations:

4
5 **District Of Columbia Circuit Holds That Providing Attorney Work Product To Independent Auditors
Does Not *Per Se* Waive The Protection Of The Work Product Doctrine**

6 In United States v. Deloitte LLP, No. 09-5171, 2010 WL 2572965 (D.C. Cir. Jun. 29, 2010), the United States Court
of Appeals for the District of Columbia Circuit held, among other things, that the provision of documents
7 containing attorney work product to a company's independent auditor does not waive the protection of the work
8 product doctrine. This decision, on a matter of first impression, allows companies to deliver work product to
9 outside accountants that might be relevant to their audit of the company's financial statements without fear
10 that the materials will automatically be discoverable in subsequent litigation.

11 The attorney work product doctrine was established by the Supreme Court in Hickman v. Taylor, 329 U.S. 495
(1947), which held that an attorney's notes regarding interviews with witnesses to a litigation-prompting incident
12 were protected from discovery. The doctrine was subsequently codified, in large part, in Rule 26(b)(3)(A) of the
Federal Rules of Civil Procedure, which only permits a court to order disclosure of work product when the
13 requesting party can demonstrate a "substantial need" and an inability to procure equivalent information
14 "without undue hardship." Even in the limited circumstances when a court orders such a disclosure, it still must
15 "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's
attorney or other representative concerning the litigation."

16 **Damages Caused by the Letter, in Addition to its Being Inadmissible**

17 Subject letter was not only inadmissible evidence. It was, additionally, rife with material
18 errors of the author, and which are directly, and frequently, rebutted by the disclosures of the
19 offering documents of Investors Prime Fund, LLC, and SBC Portfolio, LLC, and other related
20 material. These offering documents were written by this very same attorney.

21 Plaintiff violated established law by using the privileged letter as an exhibit within a court
22 submission. As important, if not more important, is that defendant has reasonable cause to believe
23 that plaintiff in part, or in whole, used the impressions gained from this inadmissible letter, rife
24 with its errors, for their basis to initiating the lawsuit.

25 Defendant has reasonable cause to believe that any reader of the inadmissible letter, which
26 was rife with errors, whether read before the lawsuit or during the lawsuit, might form an incorrect
27 belief or opinion, based upon its contents, which could be very damaging to the defendants. Past,
28 present, or future readers of the inadmissible, damaging, and misleading letter could include

1 regulators, judges, members of Investors Prime Fund, LLC, a jury, or members of the general
2 public who might be following these proceedings with interest of their own.

3 Plaintiff's Senior Trial Counsel, John Bulgozdi, has, on behalf of plaintiff, violated law(s).
4 He has done so, on behalf of plaintiff, with substantial forward planning, and introduced the
5 privileged letter "at the right time", so as to produce maximum harm to defendant(s) in these
6 proceedings with regards to:

- 7 - Denial of legal fees, thereby interfering with Feathers to presenting factual matters to
8 the court to demonstrate a complete lack of validity to plaintiff's accusations
- 9 - To combine with, and buttress to maximize affect in the public hemisphere, plaintiff's
10 accusations, which were libelous, as well as a violation of the First Amendment to the
11 Bill of Rights to the Constitution, with its use of a *fighting word*, that word being
12 "Ponzi" in its complaint (Chaplinsky v. New Hampshire 315 U.S. 568 1942).
- 13 - The *fighting word* was used with deliberate illusory, to bolster plaintiff's *prima facie*
14 showing to the court. The showing, itself, employed false or deliberately and wholly
15 misleading evidentiary matter to the court.

16
17 **Closing**

18 Defendant asks the court *sue sponte* for a Rule 12(b)6 dismissal of the lawsuit, with
19 prejudice, in recognition of plaintiff's patterns of violation in due process rights of Feathers, and its
20 use of inadmissible and privileged items.

21 Defendant respectfully asks the court to consider F.R.C.P. Rule 11 sanctions against
22 plaintiff and SEC Senior Trial Counsel John Bulgozdi.

23
24
25
26 Date

11-6-12



Mark Feathers, Pro se