

1 JOHN B. BULGOZDY (Cal. Bar No. 219897)
Email: bulgozdyj@sec.gov
2 LYNN M. DEAN (Cal. Bar No. 205562)
Email: deanl@sec.gov
3 SUSAN F. HANNAN (Cal. Bar No. 97604)
Email: hannans@sec.gov

4 Attorneys for Plaintiff
5 Securities and Exchange Commission
Michele Wein Layne, Regional Director
6 John W. Berry, Regional Trial Counsel
5670 Wilshire Boulevard, 11th Floor
7 Los Angeles, California 90036-3648
Telephone: (323) 965-3998
8 Facsimile: (323) 965-3908

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

13 SECURITIES AND EXCHANGE
COMMISSION,

14 Plaintiff,

15 vs.

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

19 Defendants.

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

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
CONSOLIDATED RESPONSE TO THE
THIRD INTERIM FEE APPLICATIONS OF
THE RECEIVER AND THE RECEIVER'S
GENERAL COUNSEL, ALLEN MATKINS
LECK GAMBLE MALLORY & NATSIS
LLP [Dkt. Nos. 607, 608]**

Date: November 22, 2013

Time: 9:00 a.m.

Place: Courtroom 4, 5th Floor
(Hon. Edward J. Davila)

1 **I. INTRODUCTION**

2 Plaintiff Securities and Exchange Commission (“SEC”) respectfully submits this
3 consolidated response to the Receiver’s Third Interim Fee Application (Dkt. No. 607) and the
4 Third Interim Fee Application of Allen Matkins Leck Gamble Mallory & Natsis LLP, General
5 Counsel to the Receiver (Dkt. No. 608). During the seven months covered by the Third Interim
6 Fee Applications, the Receiver incurred fees of \$600,143.50, and seeks payment of 90% of that
7 amount, or \$540,129.15. The Receiver has provided substantial value to the receivership estate
8 during that period, and the hours incurred and hourly rate are reasonable, so that the SEC
9 supports the Receiver’s application.

10 Allen Matkins incurred fees of \$336,009.60 during the period covered by the request,
11 which reflects a blended hourly rate of approximately \$456 for 736.20 hours of work. In
12 recognition of the Court’s prior Orders, Allen Matkins seeks payment for its work at a blended
13 hourly rate of \$395, or \$290,799 in fees. This represents a substantial reduction of
14 approximately 14% over actual fees incurred. The administrative costs of this receivership have
15 no doubt been substantially increased by the highly litigious tactics of defendant Mark Feathers,
16 which has caused the Receiver to rely on his most experienced – and therefore more expensive,
17 lawyers. For example, Feathers has sought (and at one point received) from the Court authority
18 to sue the Receiver in state court, which justifiably drew the attention of more experienced
19 counsel and increased the blended hourly rate incurred by Allen Matkins. Nonetheless, in their
20 Third Interim Fee Application, Allen Matkins seeks an interim payment at the blended rate of
21 \$395. This provides a benefit to the Receiver and the defrauded investors who receive the advice
22 and experience of seasoned counsel at a much lower rate. Allen Matkins also seeks
23 reimbursement of expenses of \$9,092.27.

24 The SEC supports the requested interim payments because the costs of operation of the
25 receivership entities should not be borne by the Receiver or his professionals. Here, the
26 receivership entities are generating sufficient cash to make such interim payments and the
27 Receiver’s management is also adding to the corpus of the estate, which will ultimately benefit
28 the defrauded investors. This is in large part due to the efforts of the Receiver and his

1 professionals, who substantially cut costs and took other actions to increase the liquidity of the
2 receivership entities. The Receiver and his professionals are not responsible for the losses
3 suffered by the investors, who were defrauded by defendant Mark Feathers. While defendant
4 Feathers would like to inflict financial hardship on the Receiver and his counsel by denying them
5 interim fees, or any fees, the Court should recognize the benefits being provided to the
6 receivership entities and award appropriate interim fees. Ultimately, at the close of the
7 receivership, the Court will set the fee to be paid to the Receiver and his professionals for the
8 services provided.

9 **II. DISCUSSION**

10 **A. The Court Has Discretion To Award Interim Fees**

11 It is well established that the determination if and when to award fees and expenses to a
12 court-appointed receiver and the professionals employed by the receiver are within the Court's
13 sound discretion. *See Drilling & Exploration Corp. v. Webster*, 69 F.2d 416, 418 (9th Cir.
14 1934). The "compensation is usually determined according to the circumstances of the particular
15 case, and corresponds with the degree of responsibility and business ability required in the
16 management of the affairs" and the difficulty involved in that management. *Stuart v. Boulware*,
17 133 U.S. 78, 81-82, 10 S. Ct. 242, 33 L. Ed. 568 (1890). Courts in the Ninth Circuit typically
18 use one of two methods to determine the appropriate fee to be paid to a receiver and his
19 professionals: the "percentage of the fund method" and the "lodestar method." *See, e.g., Powers*
20 *v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). When awarding fees, a court should consider the
21 following factors: the hours expended, the hourly rate of compensation, the difficulty and
22 quality of work performed by the consultant, and the final results obtained. *In re San Vicente*
23 *Medical Partners, Ltd.*, 962 F.2d 1042 (9th Cir. 1992); *In re Equity Funding Corp. of America*
24 *Sec. Litig.*, 438 F. Supp. 1303, 1326-27 (C.D. Cal. 1977). *See also SEC v. Fifth Avenue Coach*
25 *Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973) (court will consider complexity of
26 problems faced, benefit to receivership estate, quality of work performed, and time records
27 presented).

1 An award of interim fees may be appropriate where a receiver or the professionals
2 employed by the receiver “regularly devote[] a portion of his time, either daily or weekly, to the
3 administration of the estate[.]” *See In Re McGann Mfg. Co.*, 188 F.2d 110, 112 (3d Cir. 1951)
4 (interim fees to bankruptcy trustee or his counsel). *See also In re Alpha Telcom, Inc.*, No. CV
5 01-1283-PA, 2006 WL 3085616, at *3 (D. Ore. Oct. 27, 2006).

6 **B. An Award Of Interim Fees Is Appropriate At This Time**

7 The Receiver has continued to operate the Receivership entities in an efficient and
8 economic manner, and continues to provide good value for the benefit of the defrauded investors.
9 As stated in the SEC’s prior responses to interim fee applications, the Receiver and his counsel
10 are performing two functions: (1) operating the receivership entities as businesses, and (2)
11 performing the Court-mandated duties of a receiver. (*See, e.g.*, Dkt. No. 398.)

12 It is appropriate to tax the receivership estate with the interim costs of operating the
13 receivership entities. The receivership entities were paying such costs prior to the receivership,
14 and there is no good cause for the Receiver to be required to pay the ongoing costs of operation
15 of the companies he has been appointed to manage. Indeed, it would be difficult for courts to
16 find competent and able receivers if potential receivers knew they would be required to pay the
17 costs of operating receivership businesses out of their own pocket. While the defrauded
18 investors have suffered losses which a receiver attempts to mitigate, at the same time a receiver
19 should not be expected to pay out of his own pocket funds to help compensate the defrauded
20 investors.

21 In this case, Mr. Seaman has provided substantial value to the Court and the defrauded
22 investors in his operation of the receivership entities. As stated in the Receiver’s fee application,
23 his cost cutting and stabilization efforts are estimated to have saved investors nearly \$5 million
24 in additional expenses and losses over the duration of the receivership, compared to the costs and
25 expenses being incurred by former management. The Receiver’s fees as a percentage of gross
26 receipts during the period are 6.3%. (Dkt. No. 607 at p. 1.) In the context of a business
27 operation, this is an extremely low expense to revenue ratio. In short, even after payment of the
28 fees requested, the Receiver is providing exceptional value for the benefit of the defrauded

1 investors. It is appropriate for the Court to therefore award a reasonable and sufficient interim
2 fee that alleviates financial hardship for the Receiver as he continues to administer the entities
3 pending the final fee determination.

4 The Receiver has been assisted by his general counsel, Allen Matkins, in operating the
5 receivership entities and performing his receivership duties. In the Court's Order Partially
6 Granting Second Interim Fee Applications (Dkt. No. 590), the Court was concerned that the
7 blended hourly rate for the second fee application was \$436.46, and reduced the blended hourly
8 rate to \$327. (*Id.* at pp. 7-8.) In the Third Interim Fee Application, while Allen Matkins
9 incurred fees at a blended hourly rate in excess of \$395, it seeks an interim payment at the
10 blended rate of \$395. (See, e.g., Dkt. No. 608.) The Court and the defrauded investors benefit
11 from having experienced counsel who are providing their services at a discount. While it is
12 possible that there are other attorneys who may charge a lower hourly rate generally for their
13 work, they may not be experienced in providing counsel to a federal equity receiver so that, at
14 the end of the day, their bills may actually be higher because they are not as efficient and
15 familiar with the issues.

16 Over the course of the receivership, the blended hourly rate incurred by Allen Matkins in
17 any particular fee application will likely vary from application to application. However, at the
18 end of the receivership, the SEC fully expects that Allen Matkins will not seek a fee that is based
19 on a blended hourly rate that exceeds \$395. The SEC would likely object to fees that exceeded
20 the blended hourly rate of \$395 as stated in the Receiver's Application to Employ Allen Matkins
21 as his General Counsel (Dkt. No. 31).

22 The SEC also recognizes that at the outset of a receivership, when Allen Matkins agreed
23 to limit its blended hourly rate, it could not foresee all the legal issues that might arise in this
24 particular case. Here, for example, the Receiver is bedeviled by a particularly contumacious
25 defendant who apparently seeks to increase the costs of the administration of the receivership,
26 and then objects to any payment, in a transparent effort to impose financial hardships on the
27 Receiver and his professionals for their work for the Court. The Third Interim Fee Application
28 of Allen Matkins lists several motions filed by defendant Feathers during this particular period

1 that have caused the Receiver to incur legal costs. (*See* Dkt. No. 608 at pp. 2-3.) Many of these
2 motions have potential to cause substantial complications in the administration of the
3 receivership, and therefore the Receiver relies on his more experienced, and more expensive,
4 lawyers to respond to them. As Feathers is no doubt aware, it costs money for the Receiver to
5 respond to his motions and other tactics. While Feathers' motions may ultimately be found to
6 lack merit, the Receiver cannot simply sit by and not respond for fear that the Court may rely on
7 Feathers' motion and reach an erroneous, and potentially costly, result. Feathers' litigious tactics
8 increase the costs of administration of the receivership entities. To the extent that the Court then
9 substantially reduces the interim payments to the Receiver and his professionals – fees caused in
10 part by Feathers' conduct, Feathers achieves his goal of imposing a financial hardship on them.

11 The Court has now had the opportunity to work with the Receiver and his counsel for
12 over a year, and to assess their performance and the benefits being provided to investors. This is
13 not a receivership where the Receiver and his professionals are proposing extravagant fees that
14 are out of line with the results produced, so that the fees are eating up the corpus of the
15 receivership to the detriment of the investors. To the contrary, the Receiver and his professionals
16 are returning value to the defrauded investors by cutting expenses and through prudent
17 management so that the cash in the receivership entities is increasing, even after taking into
18 account the requested fees. Overall, the hours expended have been reasonable for the work
19 performed. Moreover, while defendant Feathers was spending millions a year of investors'
20 money to run his operation and line his pockets, the Receiver has managed to cut expenses and
21 operate the business much more economically, for the benefit of the defrauded investors.

22 The Receiver and his professionals are not responsible for the investors' losses. The
23 investors are facing losses because of Feathers' fraudulent conduct, which included taking over
24 \$7 million of the investors' funds and using them to run his business and for his own benefit.
25 There can be no question that the Receiver and his professionals are working to mitigate the
26 investors' losses. The results thus far speak for themselves, and show a marked improvement. It
27 is therefore appropriate to award the Receiver and his professional interim compensation that
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1 rewards them for their work to date and does not impose a financial hardship upon them for their
2 service to the Court and the defrauded investors.

3 **III. CONCLUSION**

4 The Commission supports approval of the fees and expenses requested in the Third
5 Interim Fee Applications of the Receiver and his general counsel, Allen Matkins.

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8 DATED: September 30, 2013

Respectfully submitted,

9
10 /s/ John B. Bulgozdy

John B. Bulgozdy

Lynn M. Dean

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 September 30, 2013, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S CONSOLIDATED RESPONSE TO THE THIRD INTERIM FEE APPLICATIONS OF THE RECEIVER AND THE RECEIVER'S GENERAL COUNSEL, ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP** 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: September 30, 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**

7 Mark Feathers (*via Email and UPS*)
8 Email: *markfeathers@sbcglobal.net*
9 1520 Grant Rd.
10 Los Altos, CA 94024
11 ***Pro Se Defendant Mark Feathers***

12 David Zaro, Esq. (*via ECF*)
13 Allen Matkins Leck Gamble Mallory & Natsis LLP
14 515 S. Figueroa Street, 9th Floor
15 Los Angeles, CA 90071
16 Email: *dzaro@allenmatkins.com*
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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