In the Matter of Mark Feathers, 3-15755

Petition for Review

Of little surprise to anybody, the Commission's ALJ ruled in favor of the Commission. On appearance, the ALJ's ruling is based upon civil court's summary judgement findings in favor of the Commission, and not upon its own independent findings of fact to support findings of securities fraud by Respondent. Abiding by the Commission's so-called "rules" of procedure and practice, the Commission's ALJ has not performed its own independent research, nor considered the possibility of error on the part of civil court in its findings.

It is folly to even consider that the Commissioner's, as political appointees holding their employment under the spoils system of the United States system of presidential politics, have the time, experience, motivation, and/or training to be able to make independent determinations of fact, when even the Commission's own ALJ's are not required in law to hold material amounts of direct experience and training in securities law sufficient for them to make independent and well supported decisions grounded in Constitutional law, and arrived at through a constitutional means of factual analysis.

The Commission's Rules of Practice are inherently biased in favor of the Commission, and against pro se Respondents. These are matters best left argued in the future by Respondent, who holds full awareness that the real audience for the following facts is the United States Ninth Circuit Court of Appeals. The Commission's Enforcement Division will not be able to contest the following irrefutable facts. On that basis Respondent asks for dismissal of administrative law proceedings against him. Such a dismissal is not likely to occur, based upon Respondent's observations of the inability of the Commission's administrative law judges to be a neutral trier considering properly deduced facts, and, for at least the Commission's ALJ Grimes, his refusal to accept evidentiary materials which contest the basis of civil and criminal court findings, and question the validity of evidentiary materials presented by Enforcement to civil and criminal court. The basis for the sudden and unsupported appointment of Judge Grimes, and Judge Grime's steady decisions overturning Judge Patil's prior decisions, will be addressed in due time by Respondent in detail before the U.S. Ninth Circuit Court of Appeals.

Respondent respectfully presents the following irrefutable facts to the Commissioners as the basis for a reversal of prior summary disposition findings against him:

1. SEC wrongfully, and in its full knowledge, employed a cash-basis analysis of Respondent's accrual-basis investment funds in its TRO, and established foundation for a seizure only through non-GAAP accounting which produced highly distorted and objectively false facts as to the financial operations and offering documents of Respondent's investment funds; see Exhibit 1, pages 8-11.

2. Respondent's investors suffered a loss of $4.8 million. These losses were not caused by operations of Respondent's investment funds, they are directly attributable to receivership expenses brought about by way of SEC's TRO of $6.7 million; see Exhibit 2.

3. The bulk of assets seized by way of SEC's TRO, approximately $30 million out of $45 million of book value of assets which were seized, were assets of Investors Prime Fund, LLC, an entity with its own federal tax id and investors separate from assets and ownership identities of Respondent's other investment funds also seized by way of SEC's civil TRO submission. Investors Prime Fund, LLC, , was

regulated, licensed, and permitted by the California Department of Corporations, was engaged only in intrastate commerce, and was engaged only in mortgage lending and servicing operations from proceeds of its own securities offering and no secondary trading activities, itself, or through its issuer, Respondent's company SB Capital, at any time in its history. SEC Enforcement deliberately omitted these materials facts and consideration from civil court in its TRO presentations in order to wrongfully bind the assets (including more than $10 million of cash balances on the date of seizure) of this fund out of the reach of Respondent and investors in the fund, and under the full control of SEC's hand-picked receiver.

4. During these administrative so-called "law" proceedings SEC has frequently made reference to Respondent's "criminal" conduct. Court pleadings show that during civil law proceedings, SEC supported its position by stating, on 2-23-17 in its pleadings, that "Judge Koh also noted that Feathers was ably represented by the Federal Public Defender in the criminal action" (*see* civil Docket 1240, page 2, lines 4-5). SEC placed at that time reliance on footnote no. 1 on page 16 of criminal Docket 92, CR14-00531-LHK, dated 12-19-16, which states therein that "Rita Bosworth…is eminently qualified to represent him in the case".

   Unrebutted facts show Respondent was never "ably" represented by the Federal Public Defender. In civil proceedings Respondent's public defender stated in February of 2017 "Mr. Feathers seeks to retain an attorney who has securities fraud experience, which undersigned counsel did not have prior to this case" (*see* civil docket 1234, Footnote 4).

   In criminal proceedings in August of 2016, Respondent's public defender stated "Presently, Mr. Feathers is represented by the Federal Public Defenders' Office. The Federal Public Defender's Office has no experience in defending SEC enforcement actions, and candidly, has limited experience in criminal securities fraud prosecutions following SEC enforcement actions" (*see* criminal docket 66, page 14, *United States v. Mark Feathers,* CV14-00531-LHK).

   SEC Enforcement, by pointing to Judge Koh's comment that Respondent was "ably" represented, while Respondent clearly was not "ably" represented as evidenced by the comments of Respondent's public defenders' own comments, supports Respondent's assertions that in civil proceedings, the court made material rulings, in error, which benefitted the Commission. These errors included a wrongful adverse summary judgement against Respondent brought about by SEC's accounting gimmickry in its TRO and its MSJ, and which were brought about because Respondent never had qualified counsel on a timely basis in either civil or criminal proceedings.

5. SEC holds full awareness that it falsely described its receiver request as a "licensed CPA" not just to assist it in bringing about his employment, but also because that receiver could also employ his own accounting gimmickry of cash-basis accounting on Respondent's accrual-basis investment funds to produce his so-called "forensic" work product relied upon and cited by civil court in its Order for summary judgement in favor of the Commission.

6. SEC holds full awareness that their hand-picked receiver never "investigated" (*see* civil Docket 30) the operations of the Funds, which presumably would have included the receiver's reading of Respondent's Fund offering document language somewhere between the date of the Receiver's appointment in June of 2012 and the date of completion of the Receiver's so-called "Preliminary Forensic Accounting" (*see* Docket 171) or his Forensic Report (*see* Docket 557) August 15th of 2013, submitted to civil court precisely one day before the Court's MSJ hearing.

7. SEC holds full awareness that civil court, in its error, held no evidentiary hearings on the receiver's reports even though Respondent showed strong basis that findings of fact presented by the Receiver in those reports could not be reliably sufficient for MSJ findings in Respondent's opposition filings (*see* civil Dockets 172 & 568) because the receiver was not qualified for a GAAP analysis, did not hire accountants who were qualified for a GAAP analysis when he could have, and should have, knowingly employed the wrong accounting analysis of Respondent's investment funds, while also failing to demonstrate in his reports on the material issue of whether, or not, Respondent was operating his Funds in accordance with the terms of the Funds' offering documents. "[A] primary purpose of appointing a receiver is to conserve the existing estate" *26 and " [r]eceivers appointed at the SEC's request are equipped with a variety of tools to help preserve the status quo while the various transactions [are] unraveled . . . to obtain an accurate picture of what transpired." Eberhard v. Marcu, 530 F.3d 122, 131 (2d Cir. 2008) (quotations omitted) (bolded alterations in original).

8. SEC holds full awareness that during civil proceedings Respondent was denied qualified counsel by the Court, in the court's error, primarily because Respondent, on an uninformed basis and while under threats from SEC, signed SEC's Order to its preliminary injunction ("PI") while not knowing (until the year 2017) that it held legally extraneous and inculpatory language even while at odds with itself by stating their to be no findings of fact. Although Respondent signed SEC's PI on 7-3-12, the Court in its remand (*see* civil Docket 70) recognized counsel of "limited engagement", but in its error failed to note that Respondent's counsel "of limited engagement" filed a Notice of Appearance only on 7-9-12. Although no findings of fact were permissible under the limited scope of Respondents' consent to SEC's preliminary injunction ("PI", *see* Dockets 29 and 29-1), SEC nonetheless included legally extraneous, inculpatory language in the PI and Order stating that "[g]ood cause exists to believe" that Mr. Feathers has engaged in, is engaging in, and is about to engage in "acts, practices and courses of business that constitute violations" of multiple provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and that "[t]he Commission has demonstrated a probability of success on the merits in this action and the possibility of dissipation of assets." The Court erroneously relied in part on the legally extraneous, inculpatory language that the SEC had inserted in the Preliminary Injunction, stating that although Respondent had not admitted to any wrongdoing by consenting to the Preliminary Injunction, the Injunction contained factual findings of fraud "that cannot be ignored."

9. SEC holds full awareness that if due process had been afforded Respondent, and his private property not been taken wrongfully (both of these violations of Respondent's protected 14th Amendment rights caused by SEC and continued by SEC's chosen Receiver), a jury of reasonable persons, had Respondent been properly represented by qualified counsel, would have found that SEC did not

establish proper foundation for either its TRO or its MSJ, and further, that SEC acted in extraordinary misconduct, likely due self-serving goals the Agency established arising from its wholly self-caused Madoff debacle (*see* civil Dockets 1355 & 1356).

10. SEC holds full awareness that the word it used in its TRO and MSJ, "Ponzi", by itself is a harmful and potentially prejudicial, term which Respondent challenged prior (*see* civil Orders, Dockets 143 and 209), and, when employed within a hyphenated-phrase, is a very vague term, at best, and very destructive on those to whom it is applied. SEC holds full awareness that despite the Court's order for SEC to not use language destructive to Fund investors and affecting the viability of Fund assets, SEC again did so in its MSJ (*see* civil Docket 537, page 8, lines 10-11). At best, SEC employed unnecessary surplusage with use of such a deliberately vague term, and, at worst SEC used the term "Ponzi" for deliberate prejudicial impact it would cause to Fund investors (*see* civil Dockets 478 & 481), and to the Court as the preliminary trier of fact, and thereby to harm Respondent.

11. SEC always held awareness that Respondent's Fund offering documents always held provisions, written by the Fund's outside counsel, that new investor capital could (exactly like a "Ponzi" scheme in the first instance, using lawful definitions of that word) properly be used for distributions to "prior" investors, and that investor Fund profits would be determined in accordance with GAAP; *see* TRO Docket 9-1, page 52 of 59, and TRO Docket 9, page 8 of 59:

> "A new investor's subscription may be used in whole or in part to fund withdrawals or redemptions"
>
> "To the extent cash distributions exceed the current and accumulated earnings and profits of the Fund, they will constitute a return of capital"

12. During this administrative law proceeding, SEC has always held awareness that in criminal proceedings the government did not dispute alleged misstatements and omissions identified by SEC to form the basis of its TRO were accurately set forth in audited financial statements and offering documents of the Funds, nor that these were readily available to any investor, *see, e.g.*, from *SEC v. Small Business Capital Corp., et al*, (CV12-03237-EJD) 6-29-2011 IPF Offering Document, Docket #9-1, at 25 [SBCC006941] (audited financial statements available); 12-28- 2009 SPF PPM, Docket #9-4, at 25 [SBCC007641] (same). Additionally, the books and records of the Funds were available for inspection. See, e.g., 12-28-2009 SPF PPM, Docket #9-4 [SBCC007641]; 1-25-2011 SPF PPM DKT 9-4 [SBCC011738]; 6-29-2011 IPF Offering Document, Docket #9-3 [SBCC006952].

13. SEC has always held full awareness that its TRO engaged in repeated instances of unreasonable conduct and violation of GAAP standards, which, for private accounting professionals, could prevent them from appearing before SEC; *see* 17 C.F.R. § 201.102(e)(1)(iv)(B)(2). SEC cannot dispute that its Enforcement accountants were "Experts", and cited Federal Rules of Evidence in their witness statements. Subsequent to that, SEC impeached its own expert's testimony (*see* civil Docket 160), creating very strong direct inference to the unreliability of their testimony in their

TRO. On that basis, the testimony of SEC in its TRO is unreliable hearsay, is inadmissible and, to the extent it is admitted, should be accorded little, if any, weight; *see* SEC Rule of Practice 320, 17 C.F.R. § 201.320; Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,226-27 (July 29, 2016); 5 U.S.C. § 556(d). SEC had a continuing obligation to produce to Respondent, but failed, until 2014 at the earliest, and never at all in full amounts as required, all material exculpatory and impeachment evidence pursuant to the Due Process Clause of the Fifth Amendment of the U.S. Constitution, the Brady doctrine, the Jencks Act, and SEC Rules of Practice 230 and 231, 17 C.F.R. §§ 201.230, .231. See supra ¶¶ 99-100.

14. SEC has always held awareness that it brought a non-public Order of Investigation of Respondent on 12-5-11, issued a subpoena to Respondent on 12-6-11, and that Respondent voluntarily stopped selling investments in March 2012.

15. SEC has always held awareness of the fact that their receiver misrepresented from the outset the financial operations of Respondent's investment funds and that his repeated appointments to SEC civil actions cause a valid basis for consideration that he is engaged in an agency relationship with the Commission, along with his counsel. The Receiver informed district court it appeared business activity "in relation to the SBA loans" was properly managed; *see* 6-28-12 Transcript, CV12-03237 EJD, Dkt. No. 1197. The Receiver's First Status Report on 7-10-12 stated (a) it "appears that the Receiver has or will shortly be in possession of funds in the amount of $10,184,613.50", and (b) the Receivership Entities could receive another $4.216 (million) in the short term, and (c) in reference to loan servicing and interest income of the funds of "$196,500 per month", "it appears that the interest income and servicing income generated by SB Capital's operations were not alone sufficient to fund payment of monthly distributions to investors…of $301,500 per month". The Commission holds full awareness that the receiver, in that crucial early report, failed "to find" an average of $134,556 of premium income to the Funds, per month, from the date of their SBA licensing on 4-1-10 through seizure 6-27-12 (*see* Docket 557, Receiver's Forensic Accounting Report, page 9, line 22, showing $3.663 million of Fund premium income), which would have covered that "shortage" and then some.

16. SEC has always held awareness that Respondent founded and managed legitimate pooled mortgage investment funds engaged in federally licensed and regulated operations, and that, caught without awareness of SEC's fraud and scheme claims on Respondent, the U.S. Small Business Administration's OIG put in a subpoena to the receiver in August 2012, followed by SBA's claim against the receivership estate exceeding $24 million, only to be later dropped by 99.8% to $40,000 (*see* Docket 1164) when irrefutable facts unfolded about the legitimacy of Fund operations.

17. SEC has always held awareness that it produced "requisite sufficiency" in its TRO only through accounting gimmickry aided by snippets and omissions of Respondent's fund offering documents. SEC's TRO Table of Contents were as follows:
    1. II.B.Feathers and SB Capital's Use/Misuse of the Funds' Moneys
    2. II.C.Defendants' Ponzi-like Payments to Investors

3. II.D. Use of Offering Proceeds
4. II.E. The Funds' Conservative Lending Standards
5. II.F. The Funds' Loan Portfolios and Their Performance
6. II.G. Conflicts of Interest Between the Funds and SB Capital

Under GAAP, "Loans to Manager" (monies advanced by the Fund to the Manager) were an asset of the Fund. Under Cash Basis, those funds represent an expense of the Fund which decreases the net income or net proceeds on a Profit and Loss statement. SEC always held awareness of disclosures and explanations in the audited financial statements, QuickBooks accounting records, and auditor-prepared workpapers that are counter to the $7.497 million portrayed in its MSJ, with similar numbers in its TRO, as "Misstatements Regarding Fund Loans and Money Transfers"."

18. SEC always held awareness that "Offering Documents' "Use of Proceeds" Section Included Provisions for Payment by the Fund to the Manager for Organizational Expenses, and that several parts of the offering documents put the reader on notice about the authority and potential conflicts with the Manager SBCC. For example, the Table of Contents to the January 28, 2011 offering document includes sections entitled RISK FACTORS, COMPENSATION TO MANAGER AND ITS AFFILIATES, CONFLICTS OF INTEREST, and USE OF PROCEEDS."

    In particular, the SUMMARY OF THE OFFERING states that "The Manager can change a portion of the organization and syndication accruals which have been, or may be incurred in the year 2010 and afterwards, and separate from any similar prior year's accruals, up to 1% of the Fund's maximum capitalization of $250,000,000, from a capital asset to a receivable from the Manager." The change referenced above equates to $2,500,000 while the limits stated in the Use of Proceeds section (see below for details from each Fund's offering documents) reference a 2% anticipated maximum which equates to $5,000,000. IPF did not exceed the maximum during the 2011 year according to the draft audited financial statements, audit workpapers, and the internal QuickBooks balance sheet report. Similarly, SEC always held awareness that the "Advances/Payments to Manager" Were Fully Disclosed in the Funds' Audit Reports". Email communications between Respondent and the Funds' auditor reveal that between April 2010 and July 2010 there was a change in the CPA's interpretation of accounting rules that guide the types of costs that may be capitalized as organization/syndication costs. In both the IPF and SPF audit reports, the auditors' opinion was that the financial statements present fairly, in all material respects, the financial position of the Funds."

19. SEC always held awareness that SPF 2010 Audit Report and Financial Statements Note 7, Related Party Transactions disclosure included details about the amount and terms of the note due from manager, and that the IPF 2010 Audit Report and Financial Statements Note 11, Related Party Transactions, disclose details about the amount and terms of the note due from manager". SEC always held awareness, with the its possession of the Fund's audited financial statements, which were consistent with the IPF QuickBooks general ledger details, that the $1,374,047 amount included in Table 1 of SEC's MSJ (see Docket 479) was known, audited and disclosed by Spiegel/SAC and, therefore, not misrepresented by MF or the Fund.

20. SEC always held awareness that the Funds' 2010 Audit Report Opinion Was Qualified Due to Inability to Assess Collectability of Receivable from Fund Manager, Not Due to Impropriety of Fund Advances, that Permission was obtained by the Manager from the Fund investors to reclassify the capital cost asset, that several parts of the various offering documents conveyed the broad authority and responsibility of the Manager, and that Respondent still sought to disclose and obtain investor approval of changes in the Fund operations and accounting, and that the Advances by IPF to Manager Continued in 2012 Under the Provisions Outlined in the Offering Documents and Operating Agreements.

21. SEC always held awareness that Respondent's outside auditor relied on language of Fund offering documents to perform accounting and produce audited financial statements that disclosed cash transfers (*see* Stalker Report at 6-14). The government held these same materials and admitted its review of these prior to the TRO (*see* Declarations 2-33, Docket 9, CV12-03237-EJD). Information regarding the Fund's performance and its current loan portfolio is set forth below was set forth in the Fund's 2010 Audited Financial Statements. The Funds' 6-29-2011 IPF Offering Document (*see* Docket 9-1) shows that "A copy of the Fund's audited financial statements as of December 31, 2010" were available from the Fund Manager and Further details about the Fund's loan portfolio are included in those financial statements". Within offering documents were tables of contents pointing investors' attention within the documents to those allowances, provisions, and reporting.

22. SEC always held full awareness that an expert witness was always beyond Respondent's resources due to SEC's asset freeze, loss of income, and poor credit from Chapter 7 and Chapter 11 bankruptcies Respondent was forced to file in 2013 and 2015. SEC raised in its TRO Respondent's fiduciary responsibilities (*see* Docket 8, page 2, line 7) without citations to California law or statute and mischaracterized that Respondent had only certain "limited conflicts" (*see* Docket 7, page 2, line 7) while holding knowledge that Fund documents had substantial references to Manager's conflicts. SEC was always Respondent's pooled mortgage funds, licensed and highly regulated by an agency of the federal government, SBA, had core lending operations which rebutted SEC's notion the Funds' were engaged in a scheme. The Receiver's Final Accounting shows loan portfolio gross servicing and interest income of $6,527,821.57 for June 2012-2016 (*see* Docket 1164, page 8). In other words, unlike a Ponzi scheme, the Funds were not "phony" and did not "lack economic substance".

23. SEC always held awareness that its TRO employed highly visible, improperly derived, central element tables of "loan premiums" up to "33%". In actuality SEC displayed premiums 300% over true amounts by varying from industry practice, which is to calculate loan premiums with fractional denominator of a date of SEC's choosing to calculate its premium, rather than dividing a premium by the gross funded amount of the loan as the denominator to that fraction, as the central element of SEC's TRO "emergency" relief claim for the appearance of "dissipation" of

investor's capital (*see* TRO, Docket 7, page 23, line 9).

24. SEC always held full awareness that it cited improper "cash transfer" citations on the first page of its TRO "Feathers and SB Capital have taken over $6 million from the funds to pay the operating expenses of SB Capital". SB Capital was entitled to reimbursement of its expenses to manage the Funds. SEC deposed Respondent at its regional headquarters in 2012 months prior to the Funds' seizure and had opportunity to question Respondent on central elements of its TRO. Respondent would have pointed to, while with counsel, provisions in Fund offering documents, auditor communications, and disclosure NOTES in audited statements to show transparency in Fund and manager operations. Respondent would have pointed to Fund documents that put investors on notice about the authority and potential of conflicts with the Manager.

25. SEC always held full awareness that during the period of claims of SEC's emergency Respondent was paying substantial monies on the Funds' receivables, and that its method in its table of Gross Cash Transfers in Docket 479 described a summation of all check payments from IPF and SPF, collectively the Funds, to the Manager, SBCC, but omitted the material information that monies were deposited into a Fund bank account by the Manager in its table.

26. SEC always held full awareness that Respondent's investment funds had liquidity features beyond their substantial balance sheet cash that allowed SB Capital to have the Funds concurrently make member distributions and to finance new SBA loans through the sale of up to 90% of SBA loans (*see* civil Docket 30, page 10, line 3). Pro se Respondent did not know the working of Federal Rules of Evidence and Civil procedure. Fund investors who were CPAs and licensed attorneys submitted letters to the Court showing indication of their belief (*see* Exhibits 1 & 2) in the potential abuse of receiverships and likely could have been investors that Respondents' qualified counsel could have taken sworn testimony from attesting on their well-founded belief in SEC's wrongs. Respondent only gained awareness after SEC's MSJ of a disgruntled past investor who communicated with SEC more than fifty times with scheme accusations from 2010-2011 due to her wrongful belief that Respondent owed her fees activities for her unlicensed securities broker work, showing lawful evidentiary violations of law by SEC while also violating the basic precept in American law to know who your accuser is.

27. SEC always held full awareness that civil suits for injunctive relief are authorized to be brought under Section 20(b) of the Securities Act, on "proper showing" of a "scheme". SEC created its "proper showing" and "reasonable likelihood" of Respondent violating federal securities laws with a TRO by alleging impropriety of "loan sales" to "generate fees to management" while holding materials showing Respondent's operations to be in accord with the Funds' offering document language. SEC's TRO employed nomenclature outside of mortgage and/or GAAP norms in its TRO to describe the Funds' "receivable" asset and the nature of the Funds' receivables as fund "loans" and in violation "of conservative loan policies" rather than by the actual representations in Fund offering documents and audited financial statements. SEC caused the Respondent to be placed into receivership without providing prior notice and opportunity to

be heard on TRO issues by way of a Wells notice which SEC typically issues to the target of its investigations before filing a complaint to allow the target to marshal evidence to demonstrate there is no basis for prosecution before assets are frozen, and during a period that Respondent had benefit of counsel; *see* 17 C.F.R. § 202.5(c). If SEC had provided Respondent with a Wells notice, he could have set forth his position with respect to why SEC should not bring an action against him; *see* page 20, "Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, produced by the Office of Chief Counsel 11/28/17". SEC's decision to freeze Respondent's assets and Fund assets contributed to the Court's denial of legal fees, *pro se* status for Respondent, and contributed to the court's ultimate determination of summary judgement in favor of SEC, which led to Respondent's criminal prosecution. In *United States v. Payment Processing Center*, 439 F. Supp. 2d 435 (E.D. Pa 2006), the Court faced an issue of some similarity as to here. The Court ruled in favor of the Defendants, who also had a TRO, and allowed the Defendant's indemnification although there was no provision for that in their operating agreement. Finding in favor of the Defendants, the Court Stated:

[A] court cannot make a final determination of willful misconduct, e.g., fraud, or recklessness in the vacuum of an e*x parte* submission. Our adversarial system of justice is founded on the notion that allegations of wrongdoing must be tested through discovery, confrontation, cross-examination, and courtroom advocacy in the public forum. The Court further explained that an *ex parte* TRO made to preserve the status quo is not a judicial determination of the merits." Here, Defendant did have fund indemnifications. The Court, however, could not be aware of Plaintiff's failure to allege in their TRO their central elements. Plaintiff used remaining civil proceedings as their means to re-test their remaining Complaint's causes of action using the same flawed cash-flow analysis and material omissions, misstatements, and mischaracterizations against a Constitutionally harmed, due process-deprived, scheme-vilified, and bankrupt and financially resourceless *pro se* Defendant.

28. SEC always held full awareness that that Fund auditor Spiegel was obligated under the Securities Exchange Act (1934) and the U.S Private Securities Litigation Reform Act of 1995 Section 10A to determine whether it was likely that an illegal act by Respondents occurred, and made no presentations in civil proceedings that the Funds' demonstrated their belief in Respondent's illegal acts under 10A prior to SEC's TRO, which was all due to the fact of Respondent's auditors were state regulated, not SEC regulated.

29. SEC always held full awareness during this OIP that the Receiver's report (see civil Docket 1164) in 2016 buttresses the validity of Respondent's financial presentations in their tax returns and audited financial statements, and discredits any validity to SEC's probable cause landscape in its TRO or its MSJ. "It takes little imagination to see that seizures based entirely on *ex parte* proceedings create a heightened risk of error." See Kaley at 1113 (Roberts, C.J., dissenting). For Respondent, SEC's TRO created instant harms, and ultimate harms that still resonate with Respondent through this day.

30. SEC always held full awareness when it submitted its TRO that there could be no balancing test between SEC's interests and that of Respondent, when SEC tipped the scales in its favor with the production of objectively false facts in its TRO by way of its knowingly wrongful method of analysis of the financial performance of the funds, and through its omissions, misstatements, and mischaracterizations of Fund offering documents. SEC's insufficient *prima facie* showing

improperly tipped the scales of its rights versus Respondent's substantive and procedural protected 14th Amendment rights to his property and to his derivative property rights of Fund indemnification for legal fees. As the statutory guardian of the nation's financial markets, SEC is imbued with enormous powers. SEC's canon of ethics cautions: "The power to investigate carries with it the power to defame and destroy." 17 C.F.R. at 200.66, and that "Judges rely on the SEC to deploy those powers conscientiously and provide accurate assessment regarding the evidence collected in their investigations. In that way, the integrity of the regime is preserved." *Opinion and Order* (Docket 140, CV15-oo894-WHP-JLC) of United States District Court of New York. (Footnote [24]; *SEC v. Management Dynamics, Inc.* 515 F.2d 801, 802 (2d Cir. 1975)."

Respondent has identified an appellate decision with some similarities to Respondent's SEC proceedings such as "loan disclosures" and "provisions in Fund governing documents" in which the Circuit denied SEC's request for an asset freeze. Respondent respectfully asks the Court to review the Circuit's Order for: Sec. & Exch. Comm'n v. Morgan UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK Jun 5, 2019 1:19-CV-00661 EAW (W.D.N.Y. Jun. 5, 2019) 1:19-CV-00661 EAW 06-05-2019.

31. SEC always held full awareness that it presented a basis that the "receivables" of Respondent's investment funds were impaired, while under GAAP there was no such basis for such an impairment which would justify SEC reversing Respondent investment Funds' historical income, or reverse their equity balance, in either their TRO, or MSJ, or both, and thereby creating their argument of a "Ponzi-like" scheme and securities fraud of Respondent.

32. It is abundantly clear, as DOJ served a grand jury subpoena on the Receiver in August 2012 weeks after the TRO and asset freeze, while Respondent was not indicted until almost two and one-half years later, that SEC and the DOJ structured civil proceedings in such a way as to deprive Respondent access to legal fees from his fund indemnifications (with DOJ even waiting until Respondent had appealed legal fees to the Ninth Circuit, so that jurisdiction on this matter no longer rested with District Court), and specifically to prevent Respondent's timely showing of SEC's gross misconduct in its TRO. "Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights." Coates, 1994 WL 455558, at *3. At Respondent's criminal sentencing the U.S. Attorney opined as to a "positive result" and a "positive outcome" with investors suffering only a loss of $4.8 million, while failing to inform the Court that the expenses of the receivership estate, brought about by SEC, were $6.7 million (*see* civil Exhibit 1293-2), accounting for more than 100% of investor losses.

Mark Feathers, pro se, Respondent

December 1, 2020

Mark Feathers, *pro se*

[redacted]

Menlo Park, CA [redacted]

[redacted]

[redacted]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

SMALL BUSINESS CAPITAL CORP., et al

Case No.: CV12-03237-EJD

Motion and Notice of Motion for Relief under Federal Rules of Civil Procedure 60(b)(1) and/or (6) and Request for Judicial Notice of Materials in Support of Motion for Relief

Request for Judicial Notice that During SEC's Claims Period Defendant's Funds' Maintained their Books and Records and Filed Their Income Tax Returns using the Accrual Method of Accounting in Accordance with Their Offering Documents

DATE: Mar. 18, 2021 TIME: 9:00 A.M.

COURTROOM: 4 JUDGE HON. EDWARD J. DAVILA

I. INTRODUCTION - RULE 60(b(6) MOTION TO REVERSE JUDGEMENT AND ORDERS

Defendant asks for Rule 60(b)(1), (2), and (6) relief on two considerations. The first basis for extraordinary relief is that in precedent civil proceedings the Court approved SEC's TRO (in 2012) and SEC's MSJ (in 2013) by making its determinations of fact based upon objectively false and highly distorted financial illustrations information provided to the Court by SEC, and which violated GAAP, because these "facts" were prepared by SEC, and the court appointed Receiver afterwards, by using a cash-basis accounting analysis on Defendant's accrual-basis accounting state regulated pooled mortgage investment Funds. Along with these highly distorted objectively false financial illustrations, SEC employed material omissions, mischaracterizations, and misstatements about the Funds in its TRO, and the receiver and his counsel, while taking $5.1 million payment for their services (*see* Docket 1293-2) failed to follow Court orders to "investigate" (*see* Docket 30) the operations of the Funds, which was presumably meant to include their reading of the Funds' offering document language somewhere between the date of the Receiver's appointment in June of 2012 and the date of completion of the Receiver's so-called "Preliminary Forensic Accounting" (*see* Docket 171) or his Forensic Report (*see* Docket 557) August 15th of 2013, precisely one day before the Court's MSJ hearing. The Court, in error, held no evidentiary hearings on the receiver's reports even though Defendant showed strong basis that findings of fact presented by the Receiver in those reports could not be reliably sufficient for MSJ findings in Defendant's opposition filings (*see* Dockets 172 & 568) because the receiver was not qualified for a GAAP analysis, did not hire accountants who were qualified for a GAAP analysis when he could have, and should have, knowingly employed the wrong accounting analysis of Defendant's investment funds, while also failing to demonstrate in his reports on the material issue of whether, or not, Defendant was operating his Funds in accordance with the terms of the Funds' offering documents. A receiver was never warranted. However, "[A] primary purpose of appointing a receiver is to conserve the existing estate" *26 and " [r]eceivers appointed at the SEC's request are equipped with a variety of tools to help preserve the status quo while the various transactions [are] unraveled . . . to obtain an accurate picture of what transpired." Eberhard v. Marcu, 530 F.3d 122, 131 (2d Cir. 2008) (quotations omitted) (bolded alterations in original).

The second basis for extraordinary relief is that Defendant was denied qualified counsel by the Court in its error primarily because Defendant, on an uninformed basis and while under threats from SEC, signed SEC's Order to its preliminary injunction ("PI") while not knowing

(until the year 2017) that it held legally extraneous and inculpatory language even while at odds with itself by stating their to be no findings of fact. Although Defendant signed SEC's PI on 7-3-12, the Court in its remand (*see* Docket 70) recognized counsel of "limited engagement", but in its error failed to note that Defendant's counsel "of limited engagement" filed a Notice of Appearance only on 7-9-12. Although no findings of fact were permissible under the limited scope of Defendants' consent to SEC's preliminary injunction ("PI", *see* Dockets 29 and 29-1), SEC nonetheless included legally extraneous, inculpatory language in the PI and Order stating that "[g]ood cause exists to believe" that Mr. Feathers has engaged in, is engaging in, and is about to engage in "acts, practices and courses of business that constitute violations" of multiple provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and that "[t]he Commission has demonstrated a probability of success on the merits in this action and the possibility of dissipation of assets." The Court erroneously relied in part on the legally extraneous, inculpatory language that the SEC had inserted in the Preliminary Injunction, stating that although Defendant had not admitted to any wrongdoing by consenting to the Preliminary Injunction, the Injunction contained factual findings of fraud "that cannot be ignored."

In its Remand to deny legal fees for Defendant (*see* Docket 70) the Court, in its error, accepted prejudicial statements of the Receiver in his unsolicited "letter-form report" with the Court (*see* Docket 54), none of whose' contents had proper evidentiary foundation to establish civil wrongdoing by Defendant sufficient for the Receiver or SEC sought to add to its causes of action against Defendant, such as Defendant's "payments to nanny and children", issuing himself a "cashier's check", or show basis as to defeat Defendant's arguments as to his own "equity injection" into his company (*see* Docket 55, page 1). In his second Status Report (*see* Docket 53) while the Receiver backpedaled on the facts as to the circumstances of the "cashier's check", citing it to be a "moot point", the Court, in its error, cited the "cashier's check", as one of the reasons to deny legal fees to Defendant (Order, Docket 70, page 6, lines 5-7). The receiver, thereafter, never presented to the Court in his interim reports or his so-called "forensic reports" any basis to support his contentions in his "letter-form report" to the Court (*see* Docket 54) that Defendant had engaged in any wrongful activities. The Court, in error, denied Defendant's subsequent requests for legal expenses (*see* Dockets 457, 510, and 1345) based on these same matters, and denied, in error, Defendant's request for appointment of an expert witness (*see* Docket 488) as "moot" because it had just prior issued its MSJ findings.

In its Remand (see Docket 70), the court cited, in its error, that Defendant's auditors could not issue a "clean" financial statement. Under GAAP there is no such definition of a "clean" financial statement. Subsequent to that, the Court, in its error, would not accept the pointing of Defendant in his pleadings to an email showing that it was Defendant's auditor who advised him as to how the Funds' should properly reflect the accounting treatment and reporting on the manager's note, and the Court, in its error, denied Defendant's motion for enjoinder of his auditors (*see* Docket 559) because of their material involvement in this matter.

On appeal, the Ninth Circuit applied correct legal rules to the wrong set of facts. Defendant could never present or argue the correct set of facts because of material errors of the Court and gross misconduct of SEC and the Receiver, who, on appearance could be likened to an agent of SEC based on his conduct and his extensive history of SEC receivership appointments. Defendant asks for Rule 60(b)(1) and/or Rule 60(b)(6) relief from the Court by way of recognizing Defendant's tolling on these issues, and a reversal of all prior Court orders adverse to Defendant, based upon gross misconduct of the United States Securities and Exchange Commission ("SEC" and/or "Plaintiff") and the Receiver, combined with errors of the Court which caused wrongful findings of fraud of Defendant.

If due process had been afforded Defendant, and had his private property not been taken wrongfully, both of these violations of Defendant's protected 14th Amendment rights caused by SEC, and continued by the Receiver, a jury of reasonable persons, had Defendant been properly represented by qualified counsel, would have found that SEC did not establish proper foundation for either its TRO or its MSJ, and further, that SEC acted in extraordinary misconduct, likely due self-serving goals the Agency established arising from its wholly self-caused Madoff debacle (*see* Dockets 1355 & 1356). Because of the extraordinary harms which have befallen Defendant from SEC's wrongful TRO, Defendant asks for extraordinary relief from the Court. Defendant is *pro se* and asks the Court to also consider if Federal Rule of Civil Procedure 9(b) is applicable.

II. ARGUMENTS

SEC, through the means described, wrongly established central fraud and scheme elements in its TRO of "Ponzi-like Payments to Investors" (*see* Docket 7, narratives and tables, pages 9-10). The word Ponzi by itself is a harmful and potentially prejudicial, term which Defendant challenged prior (*see* Orders, Dockets 143 and 209), and, when employed within a hyphenated-phrase, is a very vague term, at best, but very destructive on those to whom it is applied. Despite the Court's order for SEC to not use language destructive to Fund investors and affecting the

viability of Fund assets, SEC again did so in its MSJ (*see* Docket 537, page 8, lines 10-11); the Court erred by allowing this to Court despite its prior Orders, and in fact, the Court then in error, used the very same phrase (*see* Docket 571, page 15, line 23) in its MSJ Order in favor of SEC, likely due to SEC employing objectively false facts in its MSJ. At best, SEC employed unnecessary surplusage with use of such a deliberately vague term, and, at worst SEC used the term "Ponzi" for deliberate prejudicial impact it would cause to Fund investors (*see* Dockets 478 & 481), and to the Court as the preliminary trier of fact, and thereby to harm Defendant.

This Court should consider if Defendant was afforded equal protection as others with similar charges in a different era than SEC's heightened Ponzi-period of 2009-2012 who faced similar allegations of fraud, minus SEC's scheme of employing a "Ponzi-like" label on the Funds and Defendant. Fund offering documents always held provisions, written by the Fund's outside counsel, that new investor capital could (exactly like a "Ponzi" scheme in the first instance, using lawful definitions of that word) properly be used for distributions to "prior" investors, and that investor Fund profits would be determined in accordance with GAAP; *see* TRO Docket 9-1, page 52 of 59, and TRO Docket 9, page 8 of 59:

(1) "A new investor's subscription may be used in whole or in part to fund withdrawals or redemptions"

(2) "To the extent cash distributions exceed the current and accumulated earnings and profits of the Fund, they will constitute a return of capital"

In criminal proceedings the government did not dispute alleged misstatements and omissions identified by SEC to form the basis of its TRO were accurately set forth in audited financial statements and offering documents of the Funds, nor that these were readily available to any investor, *see, e.g.*, 6-29-2011 IPF Offering Document, Docket #9-1, at 25 [SBCC006941] (audited financial statements available); 12-28- 2009 SPF PPM, Docket #9-4, at 25 [SBCC007641] (same). Additionally, the books and records of the Funds were available for inspection. See, e.g., 12-28-2009 SPF PPM, Docket #9-4 [SBCC007641]; 1-25-2011 SPF PPM DKT 9-4 [SBCC011738]; 6-29-2011 IPF Offering Document, Docket #9-3 [SBCC006952].

SEC created a TRO replete with "facts" in its narratives, tables, spreadsheets, and charts not derived from the Funds' CPA prepared cash-basis GAAP statements, but with

objectively false "facts" SEC derived by way of a pro forma improper cash-basis analysis, "add backs" (*see* Docket 8, page 2, lines 17 and 24, page 5, line 6, and page 6, line 15), "allowance" adjustments (*id*, page 3, line 21), "calculations" (*id*, page 5, line 5), "deductions" and "reductions" (*id*, page 5, line 7 and page 6, line 5), characterizations of "erroneous" premiums and "mechanisms" (*id*, page 6, line 3), "adjustments" (*id*, line 14), and "determinations" (*id*, line 16).

Defendant's reliance on the review and approval of the challenged financial statements by professional accountants remains a complete defense, defeating both intent- and negligence-based charges; *see* e.g*., Addington v. Comm'r*, 205 F.3d 54, 58 (2d Cir. 2000). Defendant relied in good faith on accounting experts in making representations concerning impairment, fair value, and GAAP compliance; SEC's financial statements charges in all its motions should be dismissed; *see* Addington, 205 F.3d at 58.

SEC's TRO engaged in repeated instances of unreasonable conduct and violation of GAAP standards, which, for private accounting professionals, could prevent them from appearing before SEC; *see* 17 C.F.R. § 201.102(e)(1)(iv)(B)(2). SEC cannot dispute that its Enforcement accountants were "Experts", and cited Federal Rules of Evidence in their witness statements. Subsequent to that, SEC impeached its own expert's testimony (*see* Docket 160), creating very strong direct inference to the unreliability of their testimony in their TRO. On that basis, the testimony of SEC in its TRO is unreliable hearsay, is inadmissible and, to the extent it is admitted, should be accorded little, if any, weight; *see* SEC Rule of Practice 320, 17 C.F.R. § 201.320; Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,226-27 (July 29, 2016); 5 U.S.C. § 556(d). SEC had a continuing obligation to produce to Defendant, but failed, until 2014 at the earliest, and never at all in full amounts as required, all material exculpatory and impeachment evidence pursuant to the Due Process Clause of the Fifth Amendment of the U.S. Constitution, the Brady doctrine, the Jencks Act, and SEC Rules of Practice 230 and 231, 17 C.F.R. §§ 201.230, .231. See supra ¶¶ 99-100.

Through a defective TRO SEC met its lower burden requirements "than a private civil litigant" seeking a TRO or other pretrial relief, and established likelihood of success on the

merits, and a presumption of irreparable injury to Fund investors to justify injunctive relief, and a premise for the Court to freeze to assets for ancillary injunctive relief and to appoint a receiver.

III. OTHER SEC DUE PROCESS HARMS ON DEFENDANT

During the period of civil proceedings, SEC frequently arbitrarily, and without merit, exercised it substantial powers, unfairly stripping *pro se* Defendant of time necessary to defend himself during civil proceedings, and time that could have been better spent on life, liberty, and supporting his family. In 2014 Defendant gained U.S. Bankruptcy court's concurrence SEC wrongly attempted to violate Defendant's 14th Amendment property rights, where SEC lost to Defendant because neither its arguments or legal theories had merit (*see* Docket 71 "Order Granting Motion to Avoid Judicial Lien", No. 13-55816, Nor. Dist. of CA). During MSJ proceedings forced Defendant to spend much time and effort producing Opposition pleadings (*see* Docket 509) in order to protect his 5th Amendment protected privileges to not have his spouse testify against him (*see* Order, Docket 536, page 3, lines 6-10). During this same period, SEC motioned, unsuccessfully, (*see* Docket 576) for evidentiary sanctions against Defendant, but only after subjecting Defendant to third-world conditions insisting on a videotaped deposition in 2012 where Defendant arrived at SEC offices in suit and tie and was informed by SEC at the start of eight hours of depositions the office "had no air conditioning", and that SEC" had no budget for water", and informed Fund investors of same, and to be aware of SEC's deposition tactics. Following Defendant notifying Fund investors of these matters, SEC filed a motion in the middle of time and labor intensive MSJ pleadings with hundreds of pages of pleadings and exhibits which included an obituary of Defendant's spouses' recently deceased father (*see* Docket 453, Exhibit 2), raising inference of ulterior motives of SEC with both of these actions.

SEC got even with Defendant for these matters, working with DOJ to indict Defendant at the end of 2014, only after more than twelve months transpired after Defendant lost summary judgement, with that time lapse due to the fact that DOJ's charges, all relying on the work of SEC and the Receiver, could not possibly lead to a win at trial. The Fifth Amendment "prohibit[s] the government from prosecuting a defendant because of some specific animus or ill will on the prosecutor's part, or to punish the defendant for exercising a legally protected statutory or constitutional right." *United States v. Benson, 941 F.2d 598, 611 (7th Cir. 1991)*

(citations omitted). "Actual vindictiveness must play no part in a prosecutorial or sentencing decision and, since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of his rights, the appearance of vindictiveness must also be avoided." *United States v. King*, 126 F.3d 394, 397 (2d Cir. 1997) (internal quotation marks and brackets omitted). A defendant who alleges vindictive prosecution must make a showing of an appearance of vindictiveness. *United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980).* After that showing, "the burden then shifts to the prosecution to show that the prosecutor's decision to prosecute was justified." *United States v. Heldt*, 745 F.2d 1275, 1280 (9th Cir. 1984) (citation omitted). In recognition of the government's pattern of vindictiveness and misconduct, Defendant's federal public defender motioned in 2016 to compel discovery (*see* Docket 1195 and Docket 65, CV14-00531-LHK, page 10, lines 18-19).

IV. DEFENDANT'S HISTORY PRIOR TO SEIZURE ON JUNE 28, 2012

Defendant resigned his Naval commission in 1989, completed MBA studies and continued public service working from 1992 – 1994 with SBA, and from 1994-2005 building his SBA experience with FDIC insured banks as their SBA 7(a) and 504 program manager. After thousands of hours familiarizing himself with, and abiding by, SBA's complex CFR 13, SOP 50-10 and SOP 50-50, and assisting scores of small businesses with SBA loans, Defendant founded the Funds in 2006 and 2008, specifically for the purpose of the Funds becoming national SBA direct 7(a) and 504 lenders. Defendant originally named his company 504 First Mortgage Lending Corp. to make clear the nature of Defendant's business operations to prospective clients seeking expertise in SBA lending operations. In 2010 Defendant's efforts and his reputation for integrity with SBA allowed the Funds to obtain one of only fourteen national Small Business Lending Company licenses issued nationwide by SBA.

V. FACTS SHOWING DUE PROCESS INTERFERENCE THROUGH THE DATE OF, AND AFTER, DENIAL OF LEGAL FEES

SEC brought a non-public Order of Investigation of Defendant on 12-5-11. SEC issued a subpoena to Defendant on 12-6-11. Defendant voluntarily stopped selling investments in March 2012. Defendant's company and personal bank accounts, and the Funds, were seized on 6-26-12.

At seizure Defendant's company had $263,575 (*see* Docket 30, Exhibit A) cash and a civil judgement award (*see* Docket 1164, the "Cline" Judgement) originating from 2007 with book value in excess of $300,000 in 2012. That judgement had $110,507 of actual income from 2012-2016 denied from Defendant (*id*). At least $600,000 of Defendant's assets were unavailable to Defendant during the entirety of civil proceedings because of SEC's assertions that the assets were traceable to fraud through its defective TRO and Complaint, and which SEC knew of.

The Receiver informed district court it appears business activity "in relation to the SBA loans" was properly managed; *see* 6-28-12 Transcript, CV12-03237 EJD, Dkt. No. 1197. The Receiver's First Status Report on 7-10-12 stated (a) it "appears that the Receiver has or will shortly be in possession of funds in the amount of $10,184,613.50", and (b) the Receivership Entities could receive another $4.216 (million) in the short term, and (c) in reference to loan servicing and interest income of the funds of "$196,500 per month", "it appears that the interest income and servicing income generated by SB Capital's operations were not alone sufficient to fund payment of monthly distributions to investors…of $301,500 per month". The receiver failed "to find" an average of $134,556 of premium income to the Funds, per month, from the date of their SBA licensing on 4-1-10 through seizure 6-27-12 (*see* Docket 557, Receiver's Forensic Accounting Report, page 9, line 22, showing $3.663 million of Fund premium income), which would have covered that "shortage" and then some.

VI. SBA EVENTUALLY ARRIVED AT OPPOSITE CONCLUSIONS OF SEC

Caught without awareness of SEC's fraud and scheme claims on Defendant, SBA OIG put in a subpoena to the receiver in August 2012, followed by SBA's claim against the receivership estate exceeding $24 million, only to be later dropped by 99.8% to $40,000 (*see* Docket 1164) when irrefutable facts unfolded about the legitimacy of Fund operations.

VII. SEC FAILED TO ALLEGE WITH REQUISITE SUFFICIENCY IN ITS TRO

SEC's TRO Table of Contents (emphasis by underscores):

1. II.B. Feathers and SB Capital's Use/Misuse of the Funds' Moneys
2. II.C. Defendants' Ponzi-like Payments to Investors
3. II.D. Use of Offering Proceeds
4. II.E. The Funds' Conservative Lending Standards

5. II.F. The Funds' Loan Portfolios and Their Performance
6. II.G. Conflicts of Interest Between the Funds and SB Capital

Under GAAP, "Loans to Manager" (monies advanced by the Fund to the Manager) are an asset of the Fund. Under Cash Basis, those funds represent an expense of the Fund which decreases the net income or net proceeds on a Profit and Loss statement. SEC always held awareness of disclosures and explanations in the audited financial statements, QuickBooks accounting records, and auditor-prepared workpapers that are counter to the $7.497 million portrayed in its MSJ, with similar numbers in its TRO, as "Misstatements Regarding Fund Loans and Money Transfers"."

SEC always held awareness that "Offering Documents' "Use of Proceeds" Section Included Provisions for Payment by the Fund to the Manager for Organizational Expenses, and that several parts of the offering documents put the reader on notice about the authority and potential conflicts with the Manager SBCC. For example, the Table of Contents to the January 28, 2011 offering document includes sections entitled RISK FACTORS, COMPENSATION TO MANAGER AND ITS AFFILIATES, CONFLICTS OF INTEREST, and USE OF PROCEEDS."

In particular, the SUMMARY OF THE OFFERING states that "The Manager can change a portion of the organization and syndication accruals which have been, or may be incurred in the year 2010 and afterwards, and separate from any similar prior year's accruals, up to 1% of the Fund's maximum capitalization of $250,000,000, from a capital asset to a receivable from the Manager." The change referenced above equates to $2,500,000 while the limits stated in the Use of Proceeds section (see below for details from each Fund's offering documents) reference a 2% anticipated maximum which equates to $5,000,000. IPF did not exceed the maximum during the 2011 year according to the draft audited financial statements, audit workpapers, and the internal QuickBooks balance sheet report. Similarly, SEC always held awareness that the "Advances/Payments to Manager" Were Fully Disclosed in the Funds' Audit Reports". Email communications between Defendant and the Funds' auditor reveal that between April 2010 and July 2010 there was a change in the CPA's interpretation of accounting rules that guide the types of

costs that may be capitalized as organization/syndication costs. In both the IPF and SPF audit reports, the auditors' opinion was that the financial statements present fairly, in all material respects, the financial position of the Funds."

SEC always held awareness that SPF 2010 Audit Report and Financial Statements Note 7, Related Party Transactions disclosure included details about the amount and terms of the note due from manager, and that the IPF 2010 Audit Report and Financial Statements Note 11, Related Party Transactions, disclose details about the amount and terms of the note due from manager". SEC always held awareness, with the its possession of the Fund's audited financial statements, which were consistent with the IPF QuickBooks general ledger details, that the $1,374,047 amount included in Table 1 of SEC's MSJ (see Docket 479) was known, audited and disclosed by Spiegel/SAC and, therefore, not misrepresented by MF or the Fund.

SEC always held awareness that the Funds' 2010 Audit Report Opinion Was Qualified Due to Inability to Assess Collectability of Receivable from Fund Manager, Not Due to Impropriety of Fund Advances, that Permission was obtained by the Manager from the Fund investors to reclassify the capital cost asset, that several parts of the various offering documents conveyed the broad authority and responsibility of the Manager, and that Defendant still sought to disclose and obtain investor approval of changes in the Fund operations and accounting, and that the Advances by IPF to Manager Continued in 2012 Under the Provisions Outlined in the Offering Documents and Operating Agreements.

Defendant's outside auditor relied on language of Fund offering documents to perform accounting and produce audited financial statements that disclosed cash transfers (*see* Stalker Report at 6-14). The government held these same materials and admitted its review of these prior to the TRO (*see* Declarations 2-33, Docket 9, CV12-03237-EJD). Information regarding the Fund's performance and its current loan portfolio is set forth below was set forth in the Fund's 2010 Audited Financial Statements. The Funds' 6-29-2011 IPF Offering Document (*see* Docket 9-1) shows that "A copy of the Fund's audited financial statements as of December 31, 2010" were available from the Fund Manager and Further details about the Fund's loan portfolio are included in those financial statements". Within offering documents were tables of contents

pointing investors' attention within the documents to those allowances, provisions, and reporting.

VIII. OTHER SEC DUE PROCESS INTERFERENCE

SEC arguments supported the fact that Defendant needed qualified counsel when it argued Defendant's motion filings were "irrelevant or not supported by any competent evidence" (*see* Docket 617, page 1) and "…legally deficient, irrelevant, not supported by any credible evidence…" (*id*, page 8, lines 4-5). The Court, as well, in error, criticized in its Order for summary judgement in favor of SEC (*see* Docket 591) pro se Defendant's pleadings methods and styles, while failing to look at the merit of Defendant's arguments, which held sufficient evidentiary support that there should have been no MSJ findings in favor of SEC.

An expert witness was always beyond Defendant's resources due to SEC's asset freeze, loss of income, and poor credit from Chapter 7 and Chapter 11 bankruptcies Defendant was forced to file in 2013 and 2015. SEC raised in its TRO Defendant's fiduciary responsibilities (*see* Docket 8, page 2, line 7) without citations to California law or statute and mischaracterized that Defendant had only certain "limited conflicts" (*see* Docket 7, page 2, line 7) while holding knowledge that Fund documents had substantial references to Manager's conflicts. SEC was always Defendant's pooled mortgage funds, licensed and highly regulated by an agency of the federal government, SBA, had core lending operations which rebutted SEC's notion the Funds' were engaged in a scheme. The Receiver's Final Accounting shows loan portfolio gross servicing and interest income of $6,527,821.57 for June 2012-2016 (*see* Docket 1164, page 8). In other words, unlike a Ponzi scheme, the Funds were not "phony" and did not "lack economic substance".

SEC's TRO employed highly visible, improperly derived, central element tables of "loan premiums" up to "33%". In actuality SEC displayed premiums 300% over true amounts by varying from industry practice, which is to calculate loan premiums with fractional denominator of a date of SEC's choosing to calculate its premium, rather than dividing a premium by the gross funded amount of the loan as the denominator to that fraction, as the central element of SEC's TRO "emergency" relief claim for the appearance of "dissipation" of investor's capital (*see* TRO, Docket 7, page 23, line 9).

SEC cited improper "cash transfer" citations on the first page of its TRO "Feathers and SB Capital have taken over $6 million from the funds to pay the operating expenses of SB Capital". SB Capital was entitled to reimbursement of its expenses to manage the Funds. SEC deposed Defendant at its regional headquarters in 2012 months prior to the Funds' seizure and had opportunity to question Defendant on central elements of its TRO. Defendant would have pointed to, while with counsel, provisions in Fund offering documents, auditor communications, and disclosure NOTES in audited statements to show transparency in Fund and manager operations. Defendant would have pointed to Fund documents that put investors on notice about the authority and potential of conflicts with the Manager.

SEC always held awareness that during the period of claims of SEC's emergency Defendant was paying substantial monies on the Funds' receivables, and that its method in its table of Gross Cash Transfers in Docket 479 described a summation of all check payments from IPF and SPF, collectively the Funds, to the Manager, SBCC, but omitted the material information that monies were deposited into a Fund bank account by the Manager in its table.

The Court failed, in error, during predicate civil proceedings to recognize the merit to Defendant's arguments that the Fund's auditors violated attorney work product doctrine by providing SEC with a copy of a letter from Fund outside counsel without authority from the Fund Manager. SEC held lawful obligation to produce to the Court knowledge of its awareness that Defendant received an email from his counsel early in 2012 advising Defendant that he refused to be involved "in future litigation" due to recent [redacted]". Fund counsel's letter clearly was work-product doctrine protected from disclosure materials "prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). On appearance Defendant's counsel sent this letter specifically to prepare a defense for himself in anticipation of litigation; FED. R. CIV. P. 26(b)(3)(A); *see also Upjohn Co. v. United States*, 449 U.S. 383, 398 & n.7 (1981); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 341 (D.C. Cir. 2011).

SEC and the Receiver both held knowledge that the Funds had liquidity features beyond their substantial balance sheet cash that allowed SB Capital to have the Funds concurrently make

member distributions and to finance new SBA loans through the sale of up to 90% of SBA loans (*see* Docket 30, page 10, line 3). Pro se Defendant did not know the working of Federal Rules of Evidence and Civil procedure. Fund investors who were CPAs and licensed attorneys submitted letters to the Court showing indication of their belief (*see* Exhibits 1 & 2) in the potential abuse of receiverships and likely could have been investors that Defendants' qualified counsel could have taken sworn testimony from attesting on their well-founded belief in SEC's wrongs. Defendant only gained awareness after SEC's MSJ of a disgruntled past investor who communicated with SEC more than fifty times with scheme accusations from 2010-2011 due to her wrongful belief that Defendant owed her fees activities for her unlicensed securities broker work, showing lawful evidentiary violations of law by SEC while also violating the basic precept in American law to know who your accuser is.

SEC civil suits for injunctive relief are authorized to be brought under Section 20(b) of the Securities Act, on "proper showing" of a "scheme". SEC created its "proper showing" and "reasonable likelihood" of Defendant violating federal securities laws with a TRO by alleging impropriety of "loan sales" to "generate fees to management" while holding materials showing Defendant's operations to be in accord with the Funds' offering document language. SEC's TRO employed nomenclature outside of mortgage and/or GAAP norms in its TRO to describe the Funds' "receivable" asset and the nature of the Funds' receivables as fund "loans" and in violation "of conservative loan policies" rather than by the actual representations in Fund offering documents and audited financial statements. Ultimately, actual Fund investors losses of $4.8 million (see Docket 1164) were directly caused, and not linked by attenuation, to SEC's TRO and the direct expenses of the receivership estate of $6.7 million (see Exhibit 1293-2).

SEC caused the Defendant to be placed into receivership without providing prior notice and opportunity to be heard on TRO issues by way of a Wells notice which SEC typically issues to the target of its investigations before filing a complaint to allow the target to marshal evidence to demonstrate there is no basis for prosecution before assets are frozen, and during a period that Defendant had benefit of counsel; *see* 17 C.F.R. § 202.5(c). If SEC had provided Defendant with a Wells notice, he could have set forth his position with respect to why SEC should not

bring an action against him; *see* page 20, "Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, produced by the Office of Chief Counsel 11/28/17". SEC's decision to freeze Defendant's assets and Fund assets contributed to the Court's denial of legal fees, *pro se* status for Defendant, and contributed to the court's ultimate determination of summary judgement in favor of SEC, which led to Defendant's criminal prosecution. In *United States v. Payment Processing Center*, 439 F. Supp. 2d 435 (E.D. Pa 2006), the Court faced an issue of some similarity as to here. The Court ruled in favor of the Defendants, who also had a TRO, and allowed the Defendant's indemnification although there was no provision for that in their operating agreement. Finding in favor of the Defendants, the Court Stated:

> [A] court cannot make a final determination of willful misconduct, e.g., fraud, or recklessness in the vacuum of an e*x parte* submission. Our adversarial system of justice is founded on the notion that allegations of wrongdoing must be tested through discovery, confrontation, cross-examination, and courtroom advocacy in the public forum. The Court further explained that an *ex parte* TRO made to preserve the status quo is not a judicial determination of the merits." Here, Defendant did have fund indemnifications. The Court, however, could not be aware of Plaintiff's failure to allege in their TRO their central elements. Plaintiff used remaining civil proceedings as their means to re-test their remaining Complaint's causes of action using the same flawed cash-flow analysis and material omissions, misstatements, and mischaracterizations against a Constitutionally harmed, due process-deprived, scheme-vilified, and bankrupt and financially resourceless *pro se* Defendant.

The Supreme Court has already held that lowering the burden of proof substantially weakens the presumption of innocence, and has reversed cases where the standard of proof is lowered from beyond a reasonable doubt to a preponderance of the evidence. SEC is also aware that Fund auditor Spiegel was obligated under the Securities Exchange Act (1934) and the U.S Private Securities Litigation Reform Act of 1995 Section 10A to determine whether it was likely that an illegal act by Defendants occurred, and made no presentations in civil proceedings that the Funds' demonstrated their belief in Defendant's illegal acts under 10A prior to SEC's TRO, which was all due to the fact of Defendant's auditors were state regulated, not SEC regulated.

IX. CONCLUSION

Probable cause for pre-trial asset seizures must be based on particularized facts, not mere suspicion of illegal activity that Defendant participated in a scheme or artifice to defraud and had the specific intent to deprive victims of money or property. The Supreme Court has noted that

probable cause "is not a high bar: It requires only the kind of fair probability on which reasonable and prudent [people], not legal technicians, act." *Kaley v. United States*, 134 S.Ct. 1090, 1103 (2014)(internal quotation omitted). Here, SEC established probable cause solely through *ex parte* sealed affidavits of only its own Enforcement prosecutors and accountants, which not only was conclusory, but presented objectively false information based on matters described herein.

Since the TRO, the Receiver's report (see Docket 1164) in 2016 buttresses the validity of Defendant's financial presentations in their tax returns and audited financial statements, and discredits any validity to SEC's probable cause landscape in its TRO or its MSJ. "It takes little imagination to see that seizures based entirely on *ex parte* proceedings create a heightened risk of error." See Kaley at 1113 (Roberts, C.J., dissenting). For Defendant, SEC's TRO created instant harms, and ultimate harms that still resonate with Defendant through this day.

Had Defendant benefitted with qualified counsel and gone to trial, a reasonable civil juror would have seen the government impeached itself many times over (*i.e.*, see Docket 160). The Fifth Circuit has held that when government seeks equitable relief it "is as much bound to do equity as is a private litigant." *Lacy v. US ex rel. and for Use of Tennessee Valley Authority*, 216 F.2d 223, 225 (5thCir. 1954). The Fifth Circuit held that "the United States is no more immune to the general principles of equity than any other litigant." *Id.*

A reversal of prior Orders is the most effective remedy here to help deter SEC from similarly breaching its duties of care in the future. Defendant held some level of awareness, but not the ability to properly identify, nor articulate, the gravity of the flaws in SEC's TRO. We live in a society governed by laws, including those government must follow, in order to not harm citizens. SEC will always push prosecutorial limits. The Court should establish limits now for the benefit of other private citizens in order to avoid their risk of harm in the future, and in order to not allow SEC to impede fairness in litigation, such as has been experienced by Defendant.

There was no error of the Court in its preliminary injunction based on facts presented by SEC. At trial, with objectively false facts underpinning its causes of action in its complaint and knowledge of this by jurors, SEC could never have held basis for a favorable outcome nor have established merit to its case, and there is no logical argument that SEC would suffered

irreparable injury, hence its basis for a preliminary injunction, since it suffered no injury in the first instance. SEC, as a federal agency, held little at stake here with the potential of an outcome unfavorable to it, given that it enjoys a surplusage of offsetting positive outcome hundreds of times each year in civil lawsuit and administrative lawsuit, given its reporting on those matters on its agency website. Defendant and fund investors, though, suffered substantial and irreparable losses. There could be no balancing test between SEC's interests and that of Defendant's when SEC tipped the scales in its favor with the production of objectively false facts in its TRO by way of its knowingly wrongful method of analysis of the financial performance of the funds, and through its omissions, misstatements, and mischaracterizations of Fund offering documents.

With assets frozen and represented by last minute "counsel of limited engagement", and while under threats by SEC, Defendant could not contest the basis upon which SEC deprived Defendant of his protected interests, in any meaningful way, and was deprived fairness of proceedings. SEC failed to allege the basis to its TRO, gained unwarranted relief, and violated Defendant's constitutional rights before, and during civil proceedings, with Defendant – as a felon – now not enjoying the same constitutional rights and no ability to enjoy the fruits of his education and work experience. SEC's insufficient *prima facie* showing improperly tipped the scales of its rights versus Defendant's substantive and procedural protected 14th Amendment rights to his property and to his derivative property rights of Fund indemnification for legal fees.

SEC further re-injures and maligns Defendant by forcing Defendant for the past year to defend himself in the proceedings of its administrative law forum, for the second time in six years, on the basis of the same summary judgement findings against Defendant. As the statutory guardian of the nation's financial markets, SEC is imbued with enormous powers. SEC's canon of ethics cautions: "The power to investigate carries with it the power to defame and destroy." 17 C.F.R. at 200.66, and that "Judges rely on the SEC to deploy those powers conscientiously and provide accurate assessment regarding the evidence collected in their investigations. In that way, the integrity of the regime is preserved." *Opinion and Order* (Docket 140, CV15-oo894-WHP-JLC) of United States District Court of New York. (Footnote [24]; *SEC v. Management Dynamics, Inc.* 515 F.2d 801, 802 (2d Cir. 1975)."

SEC, only by employing snippets and omissions in its TRO and violating GAAP established a substantial showing of likelihood on the merits of its alleged misrepresentations. The issue now for this Court to consider is not "what reasonable investors" would have thought, but the issue if a jury of Defendant's peers would agree that SEC engaged in gross misconduct by knowingly presenting to district court a TRO that was constructed in such a way as to show fraud, when the scheme all along was that of SEC constructing its TRO in such way as to justify an asset freeze, preliminary injunction, and temporary receiver.

Defendant has identified an appellate decision with some similarities to Defendant's SEC proceedings such as "loan disclosures" and "provisions in Fund governing documents" in which the Circuit denied SEC's request for an asset freeze. Defendant respectfully asks the Court to review the Circuit's Order for: Sec. & Exch. Comm'n v. Morgan UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK Jun 5, 2019 1:19-CV-00661 EAW (W.D.N.Y. Jun. 5, 2019) 1:19-CV-00661 EAW 06-05-2019.

It is abundantly clear, as DOJ served a grand jury subpoena on the Receiver in August 2012 weeks after the TRO and asset freeze, while Defendant was not indicted until almost two and one-half years later, that SEC and the DOJ structured civil proceedings in such a way as to deprive Defendant access to legal fees from his fund indemnifications (with DOJ even waiting until Defendant had appealed legal fees to the Ninth Circuit, so that jurisdiction on this matter no longer rested with District Court), and specifically to prevent Defendant's timely showing of SEC's gross misconduct in its TRO. "Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights." Coates, 1994 WL 455558, at *3. At Defendant's criminal sentencing the U.S. Attorney opined as to a "positive result" and a "positive outcome" with investors suffering only a loss of $4.8 million, while failing to inform the Court that the expenses of the receivership estate, brought about by SEC, were $6.7 million (*see* Exhibit 1293-2), accounting for more than 100% of investor losses. Investors did not benefit from the normal procedural safeguards of a receiver, as he failed to meet the requirements of his position, and to follow Orders of the Court.

Defendant respectfully requests judicial notice of Exhibit 3 Fund tax returns, which SEC by design omitted from its TRO, showing Defendant's financial reporting prepared on an accrual basis.

The Supreme Court has long indicated economic injury must accompany fraud actions. Here, investor's injuries are those from SEC's gross misconduct, aided by the Receiver's failures, and by errors of the Court. The injuries to Defendant from these are incalculable.

Mark Feathers, pro se, Defendant November 18, 2020

Receivership Estate Expenses, *SEC v. SBCC, et al*

Amount	Description	Source
$65,107	post-closing reserve	Docket 1277, Page 2
$45,000	receiver fees	1274
$75,000	Allen Matkins fees	1274
$145,000	Taxes, tax work, contingency	1274
$60,158	Allen Matkins fees	1274
$17,500	Receiver fees	1274
$10,000	Taxes	1274
$1,754,138	Receiver Fees	1274 exh. A
$41,949	SBA settlement	1274 exh. A
$788,244	Income taxes	Docket 1164, page 9
$340,139	payroll expenses	Docket 1164, page 9
$1,946,597	receiver fees	Docket 1164, page 9
$1,028,759	Allen Matkins fees	Docket 1164, page 9
$226,855	Accounting	Docket 1164, page 9
$42,516	other professionals	Docket 1164, page 9
$6,586,959	total fees per Receiver's reports	