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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15755

In the Matter of

MARK FEATHERS,

Respondent.

MOTION BY DIVISION OF ENFORCEMENT FOR SUMMARY DISPOSITION AGAINST RESPONDENT MARK FEATHERS PURSUANT TO COMMISSION RULE OF PRACTICE 250; DECLARATION OF JOHN B. BULGOZDY; EXHIBITS

I. INTRODUCTION

The Division of Enforcement ("Division") moves pursuant to Rule 250 of the Commission's Rules of Practice for summary disposition in this follow-on proceeding against Mark Feathers ("Feathers") brought pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The Division requests that Feathers be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, and from participating in any offering of penny stock.

II. ARGUMENT

A. Summary Disposition is Appropriate in this Proceeding Based on the District Court's Findings

The Securities and Exchange Commission ("Commission") instituted this proceeding with an Order Instituting Proceedings ("OIP") on February 18, 2014, pursuant to Section 15(b) of the Exchange Act. This proceeding is a follow-on proceeding based on *SEC v. Small Business Capital Corp.*, et al., Case No. 5:12-cv-3237, filed in the Northern District of California, *appeal pending*, No. 13-17304 (9th Cir.) The District Court in that civil action granted the Commission's motion for summary judgment, and denied Feathers' motion for summary judgment, in an Order issued August 16, 2013. Declaration of John B. Bulgozdy ("Bulgozdy Dec."), Ex. 2. In an Order issued on November 6, 2013, the District Court permanently enjoined Feathers from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; the broker-dealer registration provisions of Section 15(a)(1) of the Exchange Act; and Section 17(a) the Securities Act of 1933 ("Securities Act"). Bulgozdy Dec., Ex. 1.

Feathers was served with the OIP on February 24, 2014. Under cover of a letter dated February 28, 2014, the Division produced a copy of its investigative file to Feathers. Bulgozdy Dec., Ex. 3. Feathers filed his Answer and Defenses on or about March 12, 2014. In his Answer, Feathers did not contest certain allegations in the OIP, including that he has never been registered with the Commission in any way and has never had a securities license.

At a prehearing conference on March 24, 2014, the Administrative Law Judge granted the Division leave to file a motion for summary disposition. Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, provides that after a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying, a party may move for summary disposition of any or all allegations of the OIP. A hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. Rule of Practice 250(b).

Summary disposition is particularly appropriate here because the facts have been litigated and determined in an earlier judicial proceeding, an injunction has been entered by the District Court, and the sole determination concerns the appropriate sanction. *See, e.g. Omar Ali Rizvi*, Initial Dec. Rel. No. 479 (Jan. 7, 2013), __ S.E.C. Docket __, 2013 WL 64626 ("Commission has repeatedly upheld use of summary disposition in cases where the respondent has been enjoined and the sole determination concerns the appropriate sanction."), *notice of finality*, Release No. 69019 (Mar. 1, 2013), __ S.E.C. Docket __, 2013 WL 772514; *Daniel E. Charboneau*, Initial Dec. Rel. No. 276 (Feb. 28, 2005), 84 S.E.C. Docket 3476, 2005 WL 474236 (summary disposition granted and penny stock bar issued based on injunctions and memorandum opinion issued by trial court on Commission complaint), *notice of finality*, 85 S.E.C. 157, 2005 WL 701205 (Mar. 25, 2005);

Currency Trading Int'l Inc., Initial Dec. Rel. No. 263 (Oct. 12, 2004), 83 S.E.C. Docket 3008, 2004 WL 2297418 (summary disposition granted and broker-dealer bar issued based on trial court's entry of injunctions and findings of fact and conclusions of law), *notice of finality*, 84 S.E.C. Docket 440, 2004 WL 2624637 (Nov. 18, 2004).

Moreover, where facts have been litigated and determined in an earlier judicial proceeding, as they have here, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against respondent. *See James E. Franklin*, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, *petition for review denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Michael V. Lipkin and Joshua Shainberg*, Initial Dec. Rel. No. 317 (Aug. 21, 2006), 88 S.E.C. Docket 2346, 2006 WL 2422652 ("It is well established that the Commission does not permit a respondent to relitigate issues decided in the underlying civil proceeding."), *notice of finality*, 88 S.E.C. Docket 2872, 2006 WL 2668516 (Sept. 15, 2006).

Feathers states in his Answer that he has appealed the District Court's rulings. However, the pendency of an appeal does not preclude the Commission from taking action based on an injunction. *See Franklin*, 91 S.E.C. Docket at 2714 n. 15. Instead, if Feathers is successful in his appeal, he may then request a reconsideration of any sanctions imposed in this follow-on administrative proceeding.

B. The Court Should Bar Feathers From the Securities Industry

1. Legal Standard for Imposition of a Bar

Section 15(b)(6) of the Exchange Act, as amended by Section 925 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), provides that the Commission may bar a person from being associated with a "broker, dealer, investment adviser,

municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock," if the Commission finds, on the record after notice and opportunity for a hearing, that such a bar "is in the public interest" and that the person is enjoined from certain violations of the federal securities laws, including, for the purposes of this proceeding, violations of the broker-dealer registration and antifraud provisions. *See* Section 15(b)(4)(C) of the Exchange Act.

Accordingly, to prevail on this motion for summary disposition, the Division must establish that: (1) Feathers has been enjoined from violating the federal securities laws, and (2) it is in the public interest to impose a bar against Feathers. As discussed below, the District Court's findings satisfy that test.

2. Feathers has Been Permanently Enjoined From Violating the Antifraud and Broker-Dealer Registration Provisions

On November 6, 2013, the District Court entered an order and final judgment against Feathers in the case *SEC v. Small Business Capital Corp., et al.*, permanently enjoining him from violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the broker-dealer registration provisions of Section 15(a)(1) of the Exchange Act, and Section 17(a) the Securities Act of 1933 ("Securities Act"). Bulgozdy Dec., Ex. 1.

The Division asks that the hearing officer take official notice of these undisputed facts, which are proven by the certified copies of the district court's summary judgment decision and the order and final judgment imposing permanent injunctions. *See, e.g.*, *Douglas G. Frederick*, Initial Dec. Rel. No. 356 (Sept. 9, 2008), 94 S.E.C. Docket 212, 2008 WL 4146090 ("The Commission has long recognized that the mere existence of an injunction provides a statutory basis for further

administrative proceedings against an associated person of a broker-dealer under Exchange Act Section 15(b)(6)."), *notice of finality*, 94 S.E.C. Docket 977, 2008 WL 4500336 (Oct. 8, 2008).

3. It is in the Public Interest to Bar Feathers From the Securities Industry

The facts found by the District Court establish that it is in the public interest to permanently bar Feathers from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

The imposition of administrative sanctions based upon an injunction requires consideration of the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, recognition of the wrongful conduct, and the likelihood that the respondent's occupation will present future opportunities for violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). "The existence of an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry." *Michael V. Lipkin, supra*, 2006 WL 2422652 at *4.

Here, the District Court's findings establish that a bar is warranted and in the public interest to prevent a recurrence of Feathers' unlawful conduct. The OIP summarized the District Court's findings in paragraphs II.3 and II.4, and significantly, Feathers stated in his Answer that he did not contest these summaries. *See* Feathers' Answer and Defenses at p. 2.

The District Court found that in the offer and sale of securities of two funds, Investors Prime Fund, LLC ("IPF") and SBC Portfolio Fund, LLC ("SPF") (collectively, the "Funds"), Feathers and his company, Small Business Capital Corp. ("SBCC"), made numerous material misrepresentations to investors with a high level of scienter. Bulgozdy Dec., Ex. 2. First, Feathers

caused the Funds to represent to investors that there would be no loans from the Funds to the manager SBCC other than loans secured by real property, but contrary to that representation, Feathers caused the Funds to transfer over $7 million in cash to SBCC under the guise of a "manager's note" or "due from" SBCC. *Id.* at pp. 8-13.

Second, Feathers caused the Funds to represent that they adhered to conservative lending standards by only making secured loans, but contrary to that representation, Feathers caused the Funds to make unsecured loans to SBCC, which had no ability to repay the loans. *Id.* at pp. 13-15. The District Court also found that Feathers made material misrepresentations and omissions concerning the Funds' "Operations to Date," by falsely stating that 100% of IPF's loans were secured by "First Trust Deeds" when IPF had loaned $1.85 million, or 11% of its assets, to SBCC in unsecured loans. *Id.* at p. 14. Similarly, Feathers made materially false and misleading statements that SPF had "0%" loans outstanding to SBCC as of December 31, 2010, when in fact SBCC owed SPF $707,464, which represented over 18% of SPF's assets. *Id.* at pp. 14-15.

Third, Feathers caused the Funds to represent that member returns would be paid from profits generated by the Funds' investments, but in fact the Funds were not profitable and Feathers used investors' money to make "Ponzi-like payments" of returns to investors. *Id.* at pp. 15-17. Indeed, Feathers instructed his employees to maintain monthly payments to investors in IPF and SPF at a return of 7.5% per annum and 9-10% per annum, respectively, without taking into consideration the Funds' net income or actual profitability. *Id.* at p. 15.

The District Court also found that Feathers acted with scienter. *Id.* at pp. 17-21. Thus, the District Court found that "it is beyond dispute that Feathers prepared and distributed the IPF and SPF offering circulars from at least 2009 to 2011, which clearly prohibited certain loans and money transfers. Rather than refraining from this prohibited conduct, Feathers continued to cause

the Funds to transfer cash to SBCC and make other unsecured loans and transfers since 2009." *Id.* at p. 18. The District Court further found that "Feathers' creation and utilization of 'due from' and 'manager's note' accounting evinces Feathers' intent to deceive the investors as to the true amount of cash in the Funds, or, at the least, an extreme recklessness in his management of the Funds." *Id.* at p. 19. The District Court found that "Feathers' interaction with the auditor of the Funds further evinces an intent to deceive or recklessness in his management of the Funds and representations made to investors." *Id.* The District Court found there were yet "more communications that evince that Feathers knew that his representations to investors in his letters and offering documents were false or misleading." *Id.* at p. 20.

After addressing Feathers' defenses, the District Court concluded that Feathers made material misstatements, misrepresentations, or omissions of fact to investors regarding his and SBCC's management of the Funds, and that the "misrepresentations were made with the intent to deceive investors and other parties or with extreme recklessness." *Id.* at p. 27.

The District Court also found that Feathers and SBCC fell under the definition of "brokers" under Section 15(a) of the Exchange Act, and that they were not registered with the SEC. *Id.* at pp. 27-28. Finally, the District Court found that Feathers and SBCC were liable as control persons under Section 20(a) of the Exchange Act. *Id.* at pp. 28-29.

After subsequent briefing, the District Court found that injunctive relief was warranted. In an order issued on November 6, 2013, the district court addressed the factors set forth in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), to determine whether injunctive relief was appropriate, and found that it was. Bulgozdy Dec., Ex. 1. The District Court found there was "substantial evidence of Feathers' scienter and there were multiple instances of misrepresentation." *Id.* at p. 3. The District Court further found "no evidence presented in the pleadings or in the hearing that Feathers

recognizes the wrongful nature of his conduct." *Id.* There was also no evidence that Feathers would not re-enter the brokerage industry if he were able. *Id.*

Thus, the District Court's extensive findings support entry of a bar against Feathers pursuant to Section 15(b)(6)(A), including all collateral and associational bars. Quite simply, Feathers should not be in, or in any way associated with, the securities industry.

Finally, in some of his papers Feathers challenges application of any Dodd-Frank provisions to his conduct on the grounds of retroactivity, however, Feathers conduct extended well beyond the statute's enactment. Dodd-Frank was signed into law on July 21, 2010. Feathers' illegal conduct continued through 2011 and into early 2012. Thus, there is no question of retroactivity in the application of any Dodd-Frank provisions to Feathers' conduct. Indeed, imposition of the Dodd-Frank Act collateral bars here is especially appropriate here given the need to protect the investing public prospectively from Feathers.

III. CONCLUSION

Based on the undisputed facts that Feathers has been enjoined from violating the antifraud provisions of the Exchange Act, including Section 10(b) and Rule 10b-5 thereunder, and of the

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Securities Act, including Section 17(a), and the broker-dealer registration provisions of Section 15(a) of the Exchange Act, and the undisputed facts establishing that the Steadman factors favor imposition of a bar, the Division's motion for summary disposition should be granted and Feathers should be barred pursuant to Section 15(b) of the Exchange Act.

Dated: April 7, 2014

Respectfully submitted,

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15755

In the Matter of

MARK FEATHERS,

Respondent.

DECLARATION OF JOHN B. BULGOZDY IN SUPPORT OF MOTION BY DIVISION OF ENFORCEMENT FOR SUMMARY DISPOSITION AGAINST RESPONDENT MARK FEATHERS PURSUANT TO COMMISSION RULE OF PRACTICE 250

I, John B. Bulgozdy, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am one of the attorneys representing the Division of Enforcement in this action. I have personal knowledge of the following facts and, if called as a witness, would testify competently thereo.

2. Attached as Exhibit 1 is a certified copy of the Order Granting in Part and Denying in Part Plaintiff's Motion for Injunctive Relief and Monetary Remedies entered on November 6, 2013 in *SEC v. Small Business Capital Corp., et al.*, Civil Action No. 5:12-cv-03237-EJD, in the Northern District of California.

3. Attached as Exhibit 2 is a certified copy of the Order Granting Plaintiff's Motion for Summary Judgment; Denying Defendants' Motion for Summary Judgment entered on August 16, 2013 in *SEC v. Small Business Capital Corp., et al.*, Civil Action No. 5:12-cv-03237-EJD, in the Northern District of California.

4. Attached hereto as Exhibit 3 is a true and correct copy of a letter I sent to Mark Feathers dated February 28, 2014.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 2014, in Los Angeles, California.

John B. Bulgozdy

John B. Bulgozdy

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. SMALL BUSINESS CAPITAL CORP.; MARK FEATHERS; INVESTORS PRIME FUND, LLC; and SBC PORTFOLIO FUND, LLC, Defendants.	Case No.: 5:12-CV-03237-EJD **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF AND MONETARY REMEDIES** **[Re: Docket Item No. 602]**

In this civil enforcement action brought under several federal securities laws, presently before the Court is Plaintiff Securities and Exchange Commission's ("SEC" or "Plaintiff") Motion for Injunctive Relief and Monetary Remedies against Defendant Mark Feathers ("Feathers" or "Defendant") for violations of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). Plaintiff requests a three-pronged remedy, which includes a permanent injunction against violations of specific provisions of federal securities law, disgorgement of a total amount of $7,782,961.07, and a civil penalty in the amount of $300,000.

The Court, having entered Summary judgment against Defendant Feathers on August

16, 2013, and having fully reviewed and considered the SEC's Motion, along with all other pleadings and exhibits submitted by the parties, and heard oral arguments presented by both parties at the hearing on October 22, 2013, and good cause appearing, orders that the SEC's Motion for Injunctive Relief and Monetary Remedies against Defendant Mark Feathers is GRANTED in part and DENIED in part.

I. Permanent Injunction

In the hearing, the SEC presented its arguments in support of the permanent injunction against Defendant from future violations of Section 17(a) of the Securities Act, 15. U.S.C. §77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b), and Rule 10-b thereunder, 17 C.F.R. §240.10b-5, and Section 15(a)(1) of the Exchange Act, 15 U.S.C. §78o(a)(1). The Securities Act and Exchange Act provide for injunctive relief upon a proper showing that there is a reasonable likelihood of future violations of the securities law. In its argument supporting an injunction, the SEC included the factors articulated by the Ninth Circuit Court of Appeals in SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980), which the Court can use to assess the likelihood of future violations. In Murphy, the Ninth Circuit noted that the existence of past violations may give rise to an inference that there will be future violations, but the Court must assess the totality of the circumstances surrounding the defendant and his violations to predict the likelihood of future violations, which include factors such as: (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; and (5) the sincerity of his assurances against future violations. Id. at 655.

During the hearing, the Court provided Defendant Feathers with the opportunity to respond to the Murphy elements presented by the SEC. Defendant Feathers addressed only the two last factors listed above. Feathers expressed to the Court that in his career he has always followed the rules, and will continue to do so in the future. Feathers further presented to the Court that he is currently employed at a printing company.

The Court weighed all the factors and found that Feathers did not meet his burden to rebut the SEC's presentation. In the Order previously issued by this Court, the Court found that Feathers violated the antitrust provisions of the federal securities laws in the past. The Court further found that the SEC produced substantial evidence of Feathers' scienter and there were multiple instances of misrepresentation, thus satisfying the first two factors. There is no evidence presented in the pleadings or in the hearing that Feathers recognizes the wrongful nature of his conduct, thus meeting the third factor. As to the fourth factor, Feathers did not show that he would not re-enter the brokerage industry if he were able, and in his Response indicated that in the future he would hire a securities attorney so as not to violate securities law. For the fifth factor, while not recognizing his past wrongs, Feathers claims that as he has done in the past, he will continue to follow rules in the future. As a result of the Court's careful balancing of the Murphy factors and the conclusion that the SEC has met its burden to predict the likelihood of a future violation, the injunction should issue.

IT IS HEREBY ORDERED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS HEREBY FURTHER ORDERED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED that Defendant, and his officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with them, who receive actual notice of this Final Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from violating Section 15(a) of the Exchange Act, 15 U.S.C § 78o(a), by making use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security, without being registered as a broker or dealer in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

II. Disgorgement of Ill-Gotten Gains

The SEC requests that the Court order Feathers to disgorge ill-gotten gains of $7,497,402.51, which is the total amount of cash that Feathers caused the funds to transfer to his company, SBCC, plus prejudgment interest from the date of the Receivership, totaling $285,558.56, for a total disgorgement amount of $7,782,961.07. These transfers were used to pay SBCC expenses and manage the yield of the fund, which allowed the funds to give the misleading appearance that they were generating a net income sufficient to pay the target yield returns, and

was both contrary to the representations in the offering documents and not disclosed to investors. The Court found that these misrepresentations were material.

"[A] district court has broad equity powers to order the disgorgement of ill-gotten gains obtained through the violation of the securities laws. Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." SEC v. Platforms Wireless, 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998)). To establish an appropriate disgorgement amount, the SEC need only show a "reasonable approximation" of profits or investor losses causally connected to the violations. Id. Then, the burden shifts to defendant to demonstrate that the figure is not reasonable. Id. The Court finds that the amount of $7,497,402.51 is proper, as it is directly related to the misrepresentations, the misrepresentations associated with it were material, and Feathers has not demonstrated that the figure is unreasonable.

The court has noted, "[t]he ill-gotten gains include prejudgment interest to ensure that the wrongdoer does not profit from the illegal activity." SEC v. Cross Fin. Services, Inc., 908 F. Supp. 718, 734 (C.D. Cal. 1995). The decision regarding whether to grant prejudgment interest is subject to the court's broad discretion, taking into account the need to compensate the wronged parties for actual damages, considerations of fairness and the relative equities of the award, the remedial purposes of the statute involved, and such other principles the Court finds relevant. SEC v. Olins, 762 F. Supp. 2d 1193, 1198 (N.D. Cal. 2011). Here, the Court determines that it is appropriate to order Feathers to pay prejudgment interest, calculated pursuant to 26 U.S.C. §6621, on the cash that he transferred from the Funds to pay SBCC's expenses and target yield returns.

IT IS HEREBY FURTHER ORDERED that Defendant is liable for disgorgement of $7,497,402.51, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $285,558.56, for a total of $7,782,961.07. Defendant shall satisfy this obligation by paying $7,782,961.07 to the SEC within 90 days after entry of this Final Judgment.[1]

[1] Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from

III. Civil Penalty

Sections 20(d) of the Securities Act and 21(d)(3)(A) of the Exchange Act provide the district court with authority to impose civil penalties for violations of the Acts. There are three tiers of penalties possible and the amount of the penalty is to be determined by the court. SEC v. Olins, 762 F. Supp. 2d at 1199. While the Court may order a "first-tier" penalty "in light of the facts and circumstances" of the case, a higher, "second-tier," penalty is only warranted for a violation "involv[ing] fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and a "third-tier" penalty is only warranted where there is a further showing that "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." Id. (quoting 15 U.S.C. § 77t(d)). To assess the appropriate amount of civil penalty, courts look to the Murphy factors. See SEC v. Abacus Intern. Holding Corp., No. C 99-02191, 2001 WL 940913, *5 (N.D. Cal. August 16, 2001).

Here, the SEC requests the Court impose as a "third-tier" civil penalty in the amount of $150,000 for each fund, totaling $300,000. For the reasons articulated earlier in regards to the Murphy factors, the Court finds it appropriate to order a "second-tier" civil penalty, because the

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a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Mark Feathers as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 90 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

violation involved misrepresentation, and in its discretion orders a civil penalty in the amount of $10,000 against Defendant.

IT IS FURTHER ORDERED that Defendant shall pay a civil penalty in the amount of $10,000 to the SEC pursuant to Section 20(d) of the Securities Act, 15 U.S.C. §77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). Defendant shall make this payment within 90 days after entry of this Final Judgment.

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

IT IS SO ORDERED

Dated: Nov. 6, 2013

EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. SMALL BUSINESS CAPITAL CORP.; MARK FEATHERS; INVESTORS PRIME FUND, LLC; and SBC PORTFOLIO FUND, LLC, Defendants.	Case No.: 5:12-CV-3237 EJD **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **[Re: Docket Nos. 459, 477]**

The above captioned lawsuit is a civil enforcement action filed by the Securities Exchange Commission (the "SEC" or "Plaintiff") against Defendants Mark Feathers, Small Business Capital Corp., Investors Prime Fund, LLC, and SBC Portfolio Fund, LLC (collectively, "Defendants"). The SEC has brought forth causes of action related to allegations of fraud and misrepresentation in the offer and sale of investment fund securities in violation of several federal securities laws.

Presently before the Court are the parties' cross motions for summary judgment. Oral argument on these motions was presented before the Court at a hearing on June 28, 2013. Having fully reviewed the parties' papers and after hearing oral argument, the Court will GRANT the

SEC's Motion for Summary Judgment and DENY Defendant Feathers' Motion for Summary Judgment.

I. Background

Defendant Mark Feathers ("Feathers") managed two mortgage investment funds which he established in 2007: Investors Prime Fund, LLC ("IPF") and SBC Portfolio Fund, LLC ("SPF") (collectively, the "Funds"). Decl. of Mark Feathers dated May 16, 2013 ¶ 2, Docket Item No. 466. According to the offering documents of IPF and SPF issued in 2007, the Manager of the Funds was Feathers' company, Small Business Capital Corporation ("SBCC"). See, e.g., Investors Prime Fund Offering Circular dated June 11, 2009 ("2009 IPF Offering Circular") p. 21, Decl. of John Bulgozdy ISO of Pl.'s Mot. for Summ. J. Ex. 173, Docket Item No. 483; SBC Portfolio Fund Private Placement Memorandum ("PPM") dated Dec. 28, 2009 p. 9, Bulgozdy Decl. Ex. 184. Feathers founded SBCC to manage the two Funds. See Feathers Decl. dated May 16, 2013 ¶ 2. The IPF and SPF offering documents identified SBCC as the "sole manager" of the Funds with the "sole authority" to manage the affairs of the Funds. See, e.g., 2009 IPF Offering Circular, p. 16; 2009 SPF Private Placement Memo, p. i.

Consistent with that "sole authority," Feathers and his spouse, Natalie Taaffe Feathers, were the only signatories on the bank accounts of SBCC, IPF, and SPF. Dep. of Mark Feathers 35:20–37:7, Bulgozdy Decl. Ex. 218. In addition, Feathers has conceded that he approved the offering documents before they were provided to investors, and that he was "the final authority on the approval of offering documents." Dep. of Mark Feathers 401:20–23, Bulgozdy Decl. Ex. 219.

The SEC contends that beginning in 2009, Feathers caused the Funds to transfer millions of dollars to SBCC. The purpose of these transfers, the SEC contends, was to pay SBCC's operating expenses, to generate management fees, as well as to make cash distributions to investors in excess of the income and profits the Funds generated. The SEC argues that these loans, transfers, and distributions were in violation of the Funds' offering documents, circulars, and other

representations made to investors. This notion underlies the SEC's claims of fraud and misrepresentation.

On June 21, 2012, the SEC initiated the present lawsuit by filing a Complaint naming as Defendants Feathers, SBCC, IPF, and SPF. See Docket Item No. 1. The Complaint alleges the following four causes of action: (1) fraud in the offer or sale of securities in violation of Section 17(a) of the Securities Act of 1933 ("Securities Act"); (2) fraud in connection with the purchase or sale of securities in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5(a), 10b-5(b), and 10b-5(c) thereunder; (3) violation of Section 15(a) of the Exchange Act (unregistered broker-dealer); and (4) controlling person liability under Section 20(a) of the Exchange Act. Id.

On July 10, 2012, the Court issued a Preliminary Injunction and Order (1) Freezing Assets; (2) Prohibiting Destruction of Documents; (3) Requiring Accountings; and (4) Appointing a Permanent Receiver ("PI Order"). See Docket No. 34. In the PI Order, the Court ordered an immediate freeze on the assets of IPF, SPF, SBCC, and Feathers. See id. This Order also appointed Thomas A. Seaman (the "Receiver") as permanent receiver of the funds and granted him "full power over all funds, assets, collateral, premises" as equity receiver of the defendant companies SBCC, IPF, and SPF. Id. The Receiver was authorized to employ the law firm of Allen Matkins, Leck, Gamble, Mallory & Natsis, LLP as his general counsel on July 10, 2012. See Docket Item No. 36.

II. Legal Standard for Motion for Summary Judgment

A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the initial burden of informing the court of the basis for the motion and identifying the portions of the

pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets this initial burden, the burden then shifts to the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(e). The court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324. However, the mere suggestion that facts are in controversy, as well as conclusory or speculative testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. See Thornhill Publ'g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the non-moving party must come forward with admissible evidence to satisfy the burden. Fed. R. Civ. P. 56(c); see also Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). The "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e); see also Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact."). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. Anderson, 477 U.S. at 248–49; Barlow v. Ground, 943 F.2d 1132, 1134–36 (9th Cir. 1991). Conversely, summary judgment must be granted where a party

"fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322;

The Court also notes that Defendant Feathers is proceeding in this litigation pro se and on behalf of all Defendant companies. As such, the Court has liberally construed his written submissions. See Abassi v. Immigration & Naturalization Serv., 305 F.3d 1028, 1032 (9th Cir. 2002). However, liberal construction is not a substitute for Defendants' burden of production in response to a motion for summary judgment. See Bias v. Moynihan, 508 F.3d 1212, 1218–19 (9th Cir. 2007) ("A district court does not have a duty to search for evidence that would create a factual dispute . . . . A district court lacks the power to act as a party's lawyer, even for pro se litigants.").

III. Discussion

A. Securities Fraud

The SEC's first cause of action is for violations of Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1), 77q(a)(2), & 77q(a)(3). Section 17(a) prohibits fraud in the offer or sale of securities:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
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> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. §§ 77q(a)(1), 77q(a)(2), & 77q(a)(3). The SEC's second cause of action is for violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rules 10b-5(a), 10b-5(b), and 10b-

5(c) thereunder, 17 C.F.R. § 240.10b-5. Section 10(b) prohibits fraud in connection with the purchase or sale of any security:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 seeks to enforce these statutes by making the following acts in connection with the purchase or sale of any security unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

17 C.F.R. § 240.10b-5.

For the allegations relevant to this case, violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, consist of the same elements. See SEC v. Dain Rauscher, Inc., 254 F.3d 852, 855–56 (9th Cir. 2001); SEC v. TLC Invs. & Trade Co., 179 F. Supp. 2d 1149, 1153 (C.D. Cal. 2001). Violations of these provisions require a showing that Defendants made a material misstatement, misrepresentation, or omission or fact in connection with the offer or sale of a security by means of interstate commerce with the requisite mental state. See SEC v. Phan, 500 F.3d 895, 908 (9th Cir. 2007); Dain Rauscher, 254 F.3d at 855–56; SEC v. Rana Research, Inc., 8 F.3d 1358, 1364 (9th Cir. 1993); SEC v. Rogers, 790 F.2d 1450, 1458–59 (9th Cir. 1986). While securities antifraud enforcement actions often involve questions of fact,

district courts can resolve such cases on summary judgment as long as there is no genuine issue of material fact. See, e.g., TLC Invs., 179 F. Supp. 2d 1149; SEC v. Aqua Vie Beverage Corp., CV 04-414-S-EJL, 2007 WL 2025231 (D. Idaho July 9, 2007), aff'd sub nom., SEC v. Gillespie, 349 F. App'x 129 (9th Cir. 2009); SEC v. Smart, No. 2:09CV00224 DAK, 2011 WL 2297659 (D. Utah June 8, 2011), aff'd, 678 F.3d 850 (10th Cir. 2012); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1 (D.D.C. 1998).

For the reasons explained below, the Court finds that the SEC has met its burden of establishing its antifraud causes of action, and that Feathers has failed to present specific facts and evidence that introduce a genuine issue of material fact. The Court will address each element in turn, followed by a discussion of Feathers' objections and oppositions to the SEC's summary judgment motion and evidentiary support.

1. Misrepresentations, Misstatements, and Omissions

Violations of the securities antifraud provisions require that a defendant's misstatements and omissions concern facts material to the investment in or sale of securities. Basic, Inc. v. Levinson, 485 U.S. 224, 231–32 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). "An omitted fact is material 'if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1092 (9th Cir. 2010) (quoting Phan, 500 F.3d at 908). In other words, a misrepresentation, misstatement, or omission is material if there is a substantial likelihood that a reasonable investor would consider the true or complete information important in making an investment decision. See id. As such, the antifraud provisions of the securities statutes and regulations impose a "'duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading.'" SEC v. Fehn, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 504 (9th Cir. 1992)). Such a duty "arises whenever a

disclosed statement would be 'misleading' in the absence of the 'disclos[ure] of [additional] material facts' needed to make it not misleading." Id. (quoting Hanon, 976 F.2d at 504).

The SEC identifies several statements, representations, and omissions made by Feathers and Defendant companies to the Fund investors that satisfy the "material misrepresentation" element of the securities antifraud provisions. These statements were made in the Funds' offering circulars, private placement memoranda, and other documents that were distributed to the investors. The SEC asserts that these documents contained false or otherwise misrepresentative assertions about how the Funds were managed and capitalized by SBCC, how Funds' assets would and would not be transferred, and how returns on investments would be distributed to Fund members.

a. Misstatements Regarding Fund Loans and Money Transfers

The first of the misrepresentations the SEC identifies is the representation that Feathers made to investors and potential investors in the Funds that there would be "No Loans to Manager" other than certain loans secured by real property. See Pl.'s Mot. for Summ. J. 16–17, Docket Item No. 477. As an example, IPF's 2008 Offering Circular contains the following provision:

> **No Loans to Manager**. No loans will be made by the Fund to the Manager or to any of its affiliates, except for any financing extended as part of a sale of real estate owned or loans purchased as a result of foreclosure. (See "Conflicts of Interest – Sale of Real Estate Owned to Affiliates.")

Bulgozdy Decl. Ex. 172, at p. 8. This representation also appears in IPF's 2009 Offering Circular (id. Ex. 173, at p. 15), IPF's 2010 Offering Circular (id., Ex. 175, at p. 15), and IPF's Jan. 2011 Offering Circular (id. Ex. 177 at p.18), SPF's 2007 PPM (id. Ex. 182 at p. 7), SPF's 2009 PPM (id., Ex. 184 at p. 7), SPF's January 2011 PPM (id. Ex. 185 at p. 8), and SPF's August 2011 PPM (id., Ex. 188 at p. 8).

Additionally, the offering circulars, PPMs, and other documents expressly limited the expenses that would be paid by the Funds, at least with regard to IPF. IPF's Offering Circulars contain the following representation regarding Fund expenses:

> The Fund will pay for its own annual audit, LLC tax, tax return preparation, protective advances and the costs to own and maintain real property, if any is acquired in foreclosure. All other expenses will be borne by the Manager, including rent, salaries, business insurance, utilities, marketing, and other similar operational expenses[.]

See, e.g., IPF's 2010 Offering Circular, Bulgozdy Decl. Ex. 175, at p.1; IPF's Jan. 2011 Offering Circular, id. Ex. 177 at p.1; IPF's June 2011 Offering Circular, id. Ex. 177, at p.1.

The SEC argues these representations were false or misleading because Feathers was in fact causing the Funds to loan money to himself and SBCC where that financing was not part of a sale of real estate, purchased as a result of foreclosure, or otherwise secured by real property. From as early as 2009 through the date of the Receivership, a total of at least $7,497,402.51 in cash was transferred from the Funds to SBCC. See Decl. of Sarah Mitchell ISO Pl.'s Mot. for Summ. J. ¶ 4, Ex. 220 at A-00789-90, A-00882-3, Ex. 221 at A-01212-3, Docket Item No. 479. The following table summarizes the cash transfers—many of which were in large, round number amounts—from the Funds to SBCC:

Gross Cash Transfers From Funds to SBCC from January 1, 2009 through Date of Receivership					
Year	**Fund**	**Ledger Acct. No.**	**Ledger Acct. Name**	**Cash Paid to SBCC**	**Source**
2009	IPF	1770	Syndication Expense (2009)	$100,000.00	A-00624
2009	IPF	1725-22	Loan 65	$100,000.00	A-00626
2009	IPF	1725-20	Loan 300001	$152,148.37	A-00627
2009	IPF	1780-4	Organizational Expenses	$200,000.00	A-00632
2009	IPF	6550-2	Management Fees – SB Capital	$439,500.00	A-00789-90
2009	SPF	6550	Management Fees	$63,780.00	A-01212-3
2009	SPF	2050	Capitalization of Contract	$540,000.00	A-01169
2010	IPF	1250	LT Rec – Fund Mgrs Organ Invt	$1,374,047.14	A-00882
2010	SPF	1220	Due From Manager	$175,000.00	A-01273-4
2011	IPF	5020	Fund Management Fees	$100,000.00	A-00959-60
2011	IPF	1250	LT Rec – Fund Mgrs Organ Invt	$2,930,000.00	A-00882-3

2012	IPF	1250	LT Rec – Fund Mgrs Organ Invt	$400,000.00	A-00882-3
2012	SPF	5020	Fund Management Fee	$922,927.00	A-01322
Total				**$7,497,402.51**	

Id. ¶ 4. This summary of the transfers was derived from IPF's and SPF's general ledgers, which were produced to the SEC and Feathers by the Receiver. Id.

Several other documents submitted by the SEC in support of its summary judgment motion, confirm that large sums of cash were transferred from IPF to SBCC. The audit report of the financial statements of IPF for 2010 and 2009, prepared by Spiegel Accountancy Group, shows that SBCC owed $1.85 million to IPF as of December 31, 2010. See Decl. of Jeffrey Spiegel ISO of Pl.'s Mot. for Summ. J. Exs. 27, 44, Docket Item No. 480. The draft audited financial statements for IPF for 2011 show that SBCC owed $4,863,479 to IPF as of December 31, 2011. Id. Ex. 46 at p. 15. This report also notes that these loans were unsecured. Id. As noted, IPF's general ledger shows additional cash transfers from the bank accounts of IPF to SBCC in the amount of at least $400,000 in early 2012. See Mitchell Decl. Ex. 220 at A-00882-3.

The SEC has also submitted several documents that confirm the transfers from SPF to SBCC. The audit report of the financial statements of SPF for 2010 and 2009, prepared by Spiegel Accountancy Group, shows that SBCC owed $707,464 to SPF as of December 31, 2010. See Spiegel Decl. Ex. 28. The draft audited financial statements for SPF for 2011 show that SBCC owed $690,868 as of December 31, 2011. Id. Ex. 47. Like with the reports for IPF, this report notes that these loans were unsecured. Id. at p.18. SPF's general ledger records additional cash transfers from SPF's bank accounts to SBCC totaling $922,927 in the first five months of 2012 for management fees. See Mitchell Decl. Ex. 221 at A-01322.

The SEC asserts and has provided evidence establishing that Feathers used the money he transferred from the Funds to SBCC to pay SBCC's expenses and to manage the yield of the Funds. Feathers was able to do this under the guise of "due from" or "manager's note" accounting on the Funds' financial statements to supposedly account for these cash transfers. Some of the

evidence the SEC has presented in support of its claims was obtained from David Gruebele, a management consultant employed by Feathers from 2009 through 2012. See Decl. or David Gruebele ISO of Pl.'s Mot. for Summ. J., Docket Item No. 482. According to Gruebele, the "due from manager" or "manager's note" labeling had a twofold effect. First, this provided a mechanism for the Funds to pay SBCC's "management fees" since SBCC was not earning any net management fees from the Funds under the terms of the offering documents. Id. ¶ 9. Second, recording the transfers as "due from" or "manager's note" had the effect of converting the excess expenses into an "asset" of the Funds rather than a liability. Id. This allowed the Funds to give the misleading appearance that they were still generating a net income necessary to pay the target yield of returns to investors. Id.

The SEC provides numerous documents in support of these assertions. See Pl.'s Mot. for Summ. J. 3–4. For example, a September 2011 email exchange between Feathers and Gruebele states that SBCC needed approximately $225,000 in cash to pay its September 2011 expenses, and lists nine items. The first four items are obligations of SBCC: (1) interest on the "due from" SBCC to SPF, (2) interest on the "due from" SBCC to IPF, (3) interest on Loan 300001—a loan from IPF to SBCC; and (4) interest on Loan 65—another loan from IPF to SBCC. See Gruebele Decl., ¶¶ 14–17, Exs. 56, 73. The remaining items—payroll, Amex, Citibank, rents, and "misc"—were also expenses incurred by SBCC. Id., ¶ 16. The SEC has provided additional emails evincing the "due from" or "manager's note" labeling of the cash transfers. See, e.g., Gruebele Decl. Exs. 69, 74. Additionally, Feathers communicated in an email in December 2010 to Gruebele about using the "due-from-manager fund asset" to "ensure hitting our yield target to investors of 7.5% (compounded)." Id. ¶ 19, Ex. 112.

The Funds' auditor has also confirmed this organization of the Funds' expenses. See Spiegel Decl. ¶¶ 16, 34, Ex. 49. For example, a work paper from the audit of IPF's 2009 financial statements on "Due from Manager LS" notes that the balance "represents money that the Fund advanced to the Fund Manager," that "the Fund Manager is not allowed to take out loans/advances

against the Fund," and that Feathers had assured the auditor that the amount would be "repaid during the 2010 year." Id. ¶¶ 34, 35, Ex. 49. When the IPF auditor determined that IPF needed to restate its 2009 financial statements to reverse the $300,000 that had been capitalized as a syndication expense, Feathers stated that he preferred that the restatement reclassify these costs as "due from manager." Id. ¶¶ 32, 39–41, Exs. 13, 14. The SPF auditors, similarly, required SBCC and SPF to reclassify over $500,000 in cash expenditure in the 2009 financial statements, and required SPF to disclose that the "due from" listing was in violation of the SPF offering documents. Id. ¶¶ 43, 44, Exs. 16, 53. Spiegel has also asserted that by the end of 2010, the amount that IPF had loaned to SBCC under the "due from" had grown to over $1 million. Id. ¶ 49, Ex. 19. The alleged note receivable from SBCC became an issue between Feathers and the Funds' auditor during the audit of the 2011 financial statements. See id. ¶¶ 75–80, Exs. 38–43. For example, on or about April 24, 2012, the Funds' independent outside auditor received a letter addressed to Feathers from the Fund's outside counsel which stated that Feathers' failure to disclose SBCC's borrowing from IPF was "highly misleading" and did "not comply with the offering documents." Id. ¶ 81, Ex. 44; see also Bulgozdy Decl. Ex. 192; id. Ex. 218 (Feathers Dep. 415:16–453:6).

The SEC has also established that Feathers did not disclose to the investors that, contrary to the representations from the offering documents, cash from the Funds was being transferred to SBCC. As noted, these transfers had been occurring with regard to IPF and SPF since 2009. The subsequent offering documents—e.g., the 2010 IPF Offering Circular, 2011 IPF Offering Circular, SPF's January 2011 PPM, and SPF's August 2011 PPM—all contained the same "No Loans to Manager" language and limitations on the Funds' payment of manager fees and expenses. In addition, Feathers sent several communications to the investors in the Funds requesting amendments to the offering circulars and the operating agreements. On or around May 24, 2010, Feathers sent a letter to IPF investors proposing to, among other things, "Increase permissible syndication expenses to two percent of fund capital." See Decl. of Robert Morris ISO Pl.'s Mot. for Summ. J. Ex. 136, Docket Item No. 481. Nothing in this letter disclosed that Feathers and SBCC

had been previously engaged in borrowing or planning on borrowing cash from IPF in an unsecured loan, in violation of the representations of the offering circulars. On or around August 15, 2010, Feathers sent a letter to IPF investors asking for "concurrence" in a modification of the IPF operating agreement "to initiate beneficial financial and tax planning for the fund." See id. Ex. 130. Like the May 2010 letter, this communication did not disclose the unsecured loans from IPF to SBCC nor request approval or ratification of these loans.

The SEC also contends, and the Court agrees, that these misrepresentations were material. The loans and money transfers between the Funds and from the Funds to SBCC allowed Feathers to conceal or misrepresent the true net income, performance, and yield of the Funds. In that vein, the "due from" and "manager's note" accounting practice removed expenses and liabilities from the Funds' financial statements by virtually converting them to assets of the Funds. As such, and applying the "reasonable investor" standard articulated by the Ninth Circuit to test materiality, the Court finds that there is a substantial likelihood that a reasonable investor would have viewed the disclosure of the truth about these loans and money transfers as altering the total mix of information made available and important information in making the decisions to invest with IPF or SPF. See Platforms Wireless, 617 F.3d at 1092. This is confirmed by declarations from at least two investors who have asserted that had they been fully aware that Feathers was causing the Funds to lend money to SBCC they would have considered that information important and likely would have withdrawn their investments. See Morris Decl. ¶¶ 17–20; Decl. of Barbara Bushee ISO Pl.'s Mot. for Summ. J. ¶ 8, Docket Item No. 478.

b. Misstatements Regarding Conservative Lending Standards

The SEC next asserts that Feathers made material misrepresentations in the Funds' offering documents that the Funds would be managed under conservative lending standards. Specifically, the Funds' disclosures stated that all loans made by the Funds would be secured by deeds of trust and the Funds have and would continue to use conservative 65% or 75% loan-to-value guidelines.

The IPF Offering Circulars represented that IPF would invest in "loans secured by first deed of trust encumbering commercial and income producing residential real estate." See, e.g., IPF's 2008 Offering Circular, Bulgozdy Decl. Ex. 172, at cover page, p. 7; IPF's 2009 Offering Circular, id. Ex. 173, at pp. 1, 13, 15; IPF's 2010 Offering Circular, id., Ex. 175, at pp. 1, 13, 14; IPF's Jan. 2011 Offering Circular, id. Ex. 177 at pp. 1, 16. Similarly, the SPF offering documents represented that SPF would invest in loans "secured by first and second deeds of trust." See, e.g., SPF's 2007 PPM, id. Ex. 182, at cover page, p. 7; SPF's 2009 PPM, id. Ex. 184. SPF represented that it would invest in loans where the "loan-to-value" ratio would not exceed 75% of the value of the security property, see, e.g., id., Ex. 184 at p. 6; IPF represented that it used a more conservative 65% (or less) loan-to-value ratio, see, e.g., id., Ex. 175 at p. 14. The offering documents also represented that the Funds were and would continue to be managed—by SBCC and Feathers—in accordance with generally accepted accounting principles ("GAAP"). See, e.g., IPF's 2009 Offering Circular, id. Ex. 173, at pp. 17; SPF's January 2011 PPM, id. Ex. 185 at p. 25. As shown in the preceding section, these representations were materially false and misleading because the loans and money transfers Feathers caused the Funds to make to SBCC were not secured by any real property, and there was no loan-to-value ratio for these unsecured loans.

Other material misrepresentations and omissions concern the Funds' "Operations to Date" sections in the offering documents. The documents omit material information concerning the unsecured receivable that SBCC owed to the Funds. As an example, the January 2011 IPF Offering Circular represents that 100% of IPF's loans were secured by "First Trust Deeds," as required by the terms of the offering. See Bulgozdy Decl. Ex. 177, at p. 22. This was materially false because, as shown above, by December 31, 2010, IPF had loaned at least $1.85 million to SBCC in an unsecured loan, which represented over 11% of IPF's total assets. See Spiegel Decl. Exs. 27, 44. Similarly, SPF's January 2011 PPM represents, in a chart titled "Portfolio Characteristics as of December 31, 2010," that "0%" of loans by dollar amount were outstanding to the Manager or Affiliates. Id. Ex. 185 at p. 9. This was materially false and misleading because, as shown in the

preceding section, by December 31, 2010, SBCC owed SPF $707,464, which represented over 18% of SPF's total assets. See Spiegel Decl. Ex. 28.

c. Misstatements Regarding Returns to Investors

The SEC also contends, and supports those contentions with voluminous evidence, that Feathers caused the Funds to make misrepresentations regarding the returns Fund members would receive on their investments. The offering documents of both Funds represented that member returns would be based on a proportionate share of the profits generated by the Funds' investments. The IPF offering documents represented that investors would be paid a "Member Preferred Return" allocated from "Fund profits." See, e.g., Bulgozdy Decl. Ex. 173 at p. 1. The IPF offering documents explicitly stated that "Monthly profits will be allocated among the Members as of the last day of each month in accordance with their respective capital account balances as of such date. Each month, profits will be allocated entirely to Members . . . ." Id. at p. 31. Similarly, the SPF offering documents represented that investors would be "allocated a proportionate share of Fund income during any month." See, e.g., id. Ex. 184 at pp. 5, 24. The SEC has also provided statements and declarations from investors that they believed the returns on their investment would be derived from the Funds' profits and that the Funds were profitable. See Morris Decl.; Bushee Decl.

The SEC has provided evidence showing that despite these representations, the Funds were not profitable and that the returns on members' investments were not being derived from the Funds' profits. Essentially, the SEC has shown that Feathers was not using Fund profits to pay out returns, but rather other member investments—contrary to the representations of the Funds' offering documents—as "Ponzi-like payments." See Pl.'s Reply ISO of Mot. for Summ. J. As explained above, Feathers had instructed his employees to maintain monthly payments to investors in IPF and SPF at a return of 7.5% per annum and 9–10% per annum, respectively, without taking into consideration the Funds' net income or actual profitability. See Gruebele Decl. ¶ 11. Gruebele

has also asserted that he advised Feathers that these distributions were greater than the net income of the Funds. Id. Gruebele avers that, in response, Feathers stated that additional income was going to be generated in the near future from new transactions that would balance the over-distribution. Id. In October 2010, as but one example, Feathers was informed by Gruebele that IPF had distributed $300,000 more to investors than net income to date. Id. ¶ 12, Ex. 76. In early 2011, Feathers was informed that IPF and SPF had each paid more to investors in returns than net income year-to-date. Id. ¶ 13, Ex. 80. This over-distribution was even reflected in SBCC internal reports. See id. ¶ 10, Ex. 79.

Feathers directed the over-distribution of the Funds' "income" to investors by means of his "due from" and "manager's note" recording. According to Feathers, during the period from 2009 to 2011 IPF reported a combined net income of $2,597,784. During that same period, Feathers caused at least $4,863,479 of expenses of IPF to be recorded as an "asset" in the form of the Note Receivable from Fund Manager. See Spiegel Decl. Exs. 27, 46 at p. 15. In reality, this amount reflected money transfers and loans from IPF to SBCC. Similarly, SPF reported a combined net income of $852,827, while over the same period Feathers caused at least $690,868 of expenses of SPF to be recorded as an "asset." Id. Exs. 28, 47. This too was perpetuated using the "due from" accounting to manage the yield of the Funds. Gruebele Decl. ¶ 9. In fact, Feathers instructed his staff on how to use the "due-from-manager fund asset" to manage earnings; in an email sent to Gruebele, Feathers stated, "As necessary we may have to use up much or all of this amount as necessary to ensure hitting our yield target to investors of 7.5% (compounded). I want to have everything buttoned up for Spiegel ahead of time." Id. Ex. 112.

The misrepresentations about the source of member returns were material for similar reasons as stated above. A reasonable investor would consider the true source of returns as important when making the decision to invest. See Platforms Wireless, 617 F.3d at 1092. There is a material difference between returns on an investment being derived from profits of the investment fund—as Feathers represented they would be—and those being derived from other members'

investments, which is ultimately unsustainable. Information regarding a company's financial condition is material to investment. United States v. Reyes, 577 F.3d 1069, 1076 (9th Cir. 2009); see also SEC v. Murphy, 626 F.2d 633, 653 (9th Cir. 1980) ("Surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."). A reasonable investor "would consider it important to know [his] funds were being misappropriated and used for purposes other than those stated when solicited." SEC v. Merrill Scott & Assocs., Ltd., No. 2:02-CV-39-TC, 2011 WL 5834271, at *11 (D. Utah Nov. 21, 2011) (citing TLC Invs., 179 F. Supp. 2d at 1153).

2. Requisite Mental State

Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 require scienter. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); see also Aaron v. SEC, 446 U.S. 680, 701–02 (1980). Scienter for violations of these provisions can be satisfied by a showing of recklessness. Nelson v. Serwold, 576 F.2d 1332 (9th Cir. 1984), cert. denied, 439 U.S. 970 (1978); Dain Rauscher, 254 F.3d at 855–56; Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568–69 (9th Cir. 1990) (en banc). "In the absence of further guidance from the Supreme Court, the Ninth Circuit has held that recklessness will satisfy the scienter requirement." Wright v. Schock, 571 F. Supp. 642, 660 & n.9 (N.D. Cal. 1983), aff'd, 742 F.2d 541 (9th Cir. 1984) (citing Nelson, 576 F.2d 1332). "Reckless conduct is conduct that consists of a highly unreasonable act, or omission, that is an 'extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" Dain Rauscher, 254 F.3d at 856 (quoting Hollinger, 914 F.2d at 1569). Violations of Section 17(a)(2) and (3) of the Securities Act require a showing of negligence. Dain Rauscher, 254 F.3d at 856; SEC v. Hughes Capital Corp., 124 F.3d 449, 453–54 (3d Cir. 1997).

Establishing scienter is typically a question of fact; however, courts can and have decided the issue of scienter on summary judgment in cases where defendants have failed to introduce particular facts or pieces of evidence showing that there exists a genuine issue of material fact with regard to the defendant's state of mind. See Platforms Wireless, 2007 WL 1238707 (explaining that defendant's good faith belief is not enough to create a genuine issue of fact as to whether he was reckless), aff'd in part and rev'd in part, 617 F.3d 1072 (9th Cir. 2010) (affirming summary judgment on claims brought under Section 10(b) of the Exchange Act and Rule 10b-5); SEC v Wilde, No. SACV 11-0315, 2012 WL 6621747 (C.D. Cal. Dec. 17, 2012) (granting summary judgment because evidence of defendants' scienter was "clear"); Aqua Vie Beverage, 2007 WL 2025231 (finding no genuine issue of material fact that the defendants acted with extreme recklessness); TLC Invs., 179 F. Supp. 2d 1149 (granting summary judgment on scienter because plaintiff had submitted "uncontroverted evidence"). Proof of scienter can be based on inferences from circumstantial evidence. SEC v. Burns, 816 F.2d 471, 474 (9th Cir. 1987); Shad v. Dean Witter Reynolds, 799 F.2d 525, 530 (9th Cir. 1986); see also SEC v. Yuen, No. CV 03-4376MRP(PLAX), 2006 WL 1390828, at *38 (C.D. Cal. Mar. 16, 2006) ("The Ninth Circuit has held that the recklessness standard can be established by demonstrating (1) a defendant's motive and opportunity to engage in securities fraud; and (2) red flags casting doubt on the truthfulness or accuracy of representations." (citing Howard v. Everex Systems, Inc., 228 F.3d 1057, 1063–65 (9th Cir. 2000))).

The SEC has presented abundant evidence demonstrating that Feathers acted intentionally or recklessly in carrying out the misrepresentations and misstatements presented in the preceding section. As an initial matter, it is beyond dispute that Feathers prepared and distributed the IPF and SPF offering circulars from at least 2009 to 2011, which clearly prohibited certain loans and money transfers. Rather than refraining from this prohibited conduct, Feathers continued to cause the Funds to transfer cash to SBCC and make other unsecured loans and transfers since 2009.

Feathers' creation and utilization of "due from" and "manager's note" accounting evinces Feathers' intent to deceive the investors as to the true amount of cash in the Funds, or, at the least, an extreme recklessness in his management of the Funds. In other words, Feathers' usage of the "due from" device actively disguised the true financial performances of the Funds. In an email to Gruebele dated December 16, 2010, Feathers explained that he sought to use the "due-from-manager fund asset" to absorb Fund expenses so as to "ensure hitting our yield." Spiegel Decl. Ex. 112. As such, the loans and money transfers that were recorded as "due from" manager created the false impression that they were assets of the Funds rather than expenses. The true effect of the "due from" accounting device allowed Feathers to pay SBCC's management expenses (in violation of the offering documents) while deceptively making it seem the Funds were properly capitalized and yielding the target net income. Id. ¶ 9. Had Feathers properly recorded the money transfers in accordance with GAAP, he would have had to establish an allowance equal to the full value of the receivables, which, as noted, would have created expenses or liabilities against the Funds' income. See Pl.'s Mot. for Summ. J. 20–21. The effect of this would have been a reported loss of the Funds since the financial statements and audit reports show that the Funds had made payments in excess of net income and returned capital. See id.

Feathers' interaction with the auditor of the Funds further evinces an intent to deceive or recklessness in his management of the Funds and representations made to investors. The SPF auditors notified Feathers that the "due from" classification was in violation of the SPF offering documents. Id. ¶¶ 43, 44, Exs. 16, 53. Similarly, the IPF auditor required the restatement of the cash transfers that had been capitalized as a syndication expense in the 2009 financial statements. Id. ¶ 32. In response, Feathers stated that he preferred that the restatement reclassify the syndication costs to the "due from manager." Id. In addition, while preparing a quarterly compilation for IPF after 2009, Spiegel learned that at least $170,000 had been added to the organizational costs of IPF. Id. ¶ 48, Ex. 18. After being notified of this, Feathers responded that he had "[taken] it upon myself to send a motion to investors to change the operating agreement to re-

categorize up to $1 MM FY 2010 accrued syndication/organizational expenses into a receivable from Fund Manager. This would be paid back over a period of 5 years, and would also have an interest rate paid to fund members of 7.5%." See Spiegel Decl. ¶ 49, Ex. 19. In response, IPF's outside auditor told Feathers, "I am not sure getting approval after the fact is proper. Generally, that should be done prior to taking money." Id.

The SEC has presented several more communications that evince that Feathers knew that his representations to investors in his letters and offering documents were false or misleading. For example, with regard to the "due from" manager, in an email dated April 3, 2012, Spiegel wrote to Feathers the following:

> Just because it shows a loan to the manager does not make it compliant with the OC or operating agreement. I believe we did and will again indicate in the audit report and financials, it violates the OC and operating agreement. Dennis [Doss, attorney of SBCC] and I agree that your communications to the investors are misleading. Besides the loan itself: your communication indicates the purpose of the loan which also is not consistent with the actual use of the proceeds. May I suggest you get some counsel on what a proper communication to your investors should include so they are fully disclosed of all fund issues.

See Bulgozdy Decl. Ex. 192. As another example of Feathers' scienter, Doss wrote to Feathers in an email on the same date, "I know you don't want to hear this but the letter is misleading. You have obtained unauthorized loans from the fund of $5M and for the past two fiscal years the fund earned less than the 7.5% it distributed to investors." Id.

Moreover, Feathers' decision to have the auditor issue a qualified opinion for the 2010 financial statements of the IPF and SPF serves as further circumstantial evidence demonstrating Feathers' scienter. After discovering the sizeable amounts of the "due from" SBCC to the Funds, Spiegel informed Feathers that he could not issue an unqualified audit opinion. Id. ¶ 49, Ex. 19. As such, Spiegel presented Feathers with three options: (1) Feathers and SBCC could pay the "due from" in full before the audit was completed; (2) Feathers and SBCC could provide a documented assessment of the collectability of the "due from" so that an appropriate loss allowance could be established for the note; or (3) the outside auditor would have to issue a qualified opinion. Id. ¶ 61.

Feathers elected to have the Funds' outside auditor issue qualified audit opinions on the 2010 financial statements rather than rectifying the questionable accounting, paying back the money that was transferred to SBCC, or making the proper disclosure to investors. Id. ¶¶ 61–62. As a result, the Funds' auditors issued qualified opinions for both IPF's and SPF's audited financial statements. See, e.g., id. Exs. 27, 28.

3. Remaining Elements: Sale of Securities by Means of Interstate Commerce

The remaining elements of the antifraud provisions are that the misrepresentations were made in connection with the offer or sale of a security by means of interstate commerce. See Phan, 500 F.3d at 908. There is no question of fact that the misrepresentations in the Funds' offering documents were connected to the sale of securities (investment in the Funds) by means of interstate commerce. These elements are not in dispute among the parties.

4. Feathers' Opposition

The Court now turns to Feathers' opposition to the SEC's summary judgment motion, his objections to the evidentiary support provided therein, and his attempts to demonstrate the existence of a genuine issue of material fact. As the non-moving party, Feathers cannot create a genuine issue of material fact simply by making assertions in his legal papers. S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., 690 F.2d 1235, 1238 (9th Cir. 1982); Wilde, 2012 WL 6621747, at *3. "When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." Hansen, 7 F.3d at 138. Rather, he must introduce and present specific, admissible evidence that a reasonable trier could find in his favor. Anderson, 477 U.S. at 248–49. As such, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus., Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In that regard, the Court is "'not required to comb the record to find some reason to deny a

motion for summary judgment.'" Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting Forsberg v. Pac. N.W. Bell Tel. Co., 840 F.2d 1409, 1418 (9th Cir.1988)); see also Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) ("[I]t is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact." (quoting Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)). "If a party wishes the court to consider an affidavit for more than one issue, the party should bring that desire to the attention of the court." Id.

Thus, Feathers "has the responsibility to identify with reasonable particularity the evidence which precludes summary judgment." SEC v. Leslie, No. C 07-3444, 2010 WL 2991038, at *17 (N.D. Cal. July 29, 2010), clarified on denial of reconsideration, No. 5:07-CV-03444-JF, 2010 WL 3259375 (N.D. Cal. Aug. 18, 2010) (citing Keenan, 91 F.3d at 1279); see also Fed. R. Civ. P. 56(c)(1). It is not enough to establish a genuine issue of material fact for Feathers to simply state that he disputes the evidence or arguments the SEC has presented because "[s]ummary judgment requires facts, not simply unsupported denials or rank speculation." McSherry v. City of Long Beach, 584 F.3d 1129, 1138 (9th Cir. 2009). Also, the moving party—in this case the SEC—can meet its burden by pointing out that the nonmoving party has failed to present any genuine issue of material fact. Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990).

The Court also reiterates that Feathers' status as a pro se litigant does not relieve him of this burden or the standards of defeating a summary judgment motion. See Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986) ("[P]ro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record."). The notion that "a district court does not have a duty to search for evidence that would create a factual dispute" in a motion for summary judgment extends to a situation where the non-moving party is pro se. Bias, 508 F.3d at 1219 (citing Jacobsen, 790 F.2d at 1365 & n.5).

In his Opposition to the SEC's Motion for Summary Judgment as well as in his own Motion for Summary Judgment, Feathers offers several arguments attempting to demonstrate that genuine issues of material fact exist with regard to the SEC's allegations. For the reasons explained below

the Court rejects these arguments and finds that Feathers' assertions fail to introduce a question of fact.

First, Feathers appears to contend that the Funds were properly capitalized and disputes the SEC's arguments that the returns paid to members were actually from other members' investments rather than the net income and profits generated by the Funds. The Court rejects this argument as Feathers fails to sufficiently point to particular and specific evidence that would raise a question of fact in light of the evidence that the SEC has provided in support of its position. For example, Feathers argues that the SEC has overstated funds distributions by more than 50%, which, he argues, created the "illusory [sic] of the [Funds'] needing new member capital for distributions, when they never did." Def.'s Opp'n to Pl.'s Mot. for Summ. J. ("Def's Opp'n") 3–4, Docket Item No. 511. In support of this assertion, Feathers only points to Exhibit 2 of his Evidentiary Objections to SEC's Motion For Summary Judgment and Related Submissions ("Feathers' Evidentiary Objections") (Docket Item No. 509), which appears to be a general description of the SEC's Enforcement Division's duties. As another example, Feathers argues that by June 2012, the Funds had approximately $14 million in cash on hand and near cash from loan sales scheduled. In support of this assertion, Feathers offers a two-page spreadsheet titled "Loan Pipeline 2012." See Feathers' Evidentiary Objections, Docket Item No. 509, Ex. 3. Aside from this document being unsupported by a declaration or other assertion establishing foundation, Feathers fails to demonstrate how it supports his position that the Funds were sufficiently and properly capitalized.

Feathers raises several arguments against the SEC's establishment of the scienter element. He initially argues that scienter can only be established at trial, not at the summary judgment phase of a litigation. Pl.'s Opp'n at 10–11. This is an incorrect statement of law; as explained above, a court's determination about a defendant's state of mind in SEC enforcement actions can be established at the summary judgment phase of a litigation. See, e.g., Platforms Wireless, 2007 WL 1238707 (affirming summary judgment on claims brought under Section 10(b) of the Exchange Act and Rule 10b-5); Wilde, 2012 WL 6621747 (granting summary judgment because evidence of

defendants' scienter was "clear"); Aqua Vie Beverage, 2007 WL 2025231 (finding no genuine issue of material fact that the defendants acted with extreme recklessness); TLC Invs., 179 F. Supp. 2d 1149 (granting summary judgment on scienter based on plaintiff's "uncontroverted evidence").

Feathers' attempts to demonstrate a genuine issue of material fact as to his scienter also fails. Feathers appears to assert that the SEC's evidence that Feathers used the "due from" to manage the Funds' yields is false. See Def.'s Opp'n at 10–11. However, he does not support this contention with particularized facts and submitted evidence. He does argue that—with regard to loan transfers being in large round numbers—Gruebele "asked for these 'rounded' transfers to ease his burden of bookkeeping and bill paying." Id. at 11. Not only is this claim unsupported by documentary evidence on the record, it is also irrelevant and non-material to Feathers' state of mind.

Feathers also appears to argue that scienter has not been sufficiently established by the SEC because SBCC had the "good faith intentions to honor the terms of the note" and "retire part, or all, of the fund's note receivables" in early 2012. Id. at 13. The evidence Feathers provides in support of this is an email chain suggesting that SBCC "engaged counsel of Foley Lardner Law" to assist with the repayment and retirement of the notes receivable. Id.; Feathers' Evidentiary Objections Ex. 7. However, this unfounded assertion that only possibly shows an intent to repay the misappropriated funds and loans is insufficient to establish a question of fact in light of the specific, particular, and abundant evidence the SEC has provided establishing Feathers' scienter. As explained in great detail, the SEC has provided sufficient evidence of Feathers' scienter with regard to all of the following contentions: that Feathers reviewed and approved the Funds' offering documents that prohibited unsecured loans to SBCC; that Feathers had caused the Funds to make unsecured and loans and cash transfers to SBCC; that Feathers failed to disclose this to past and future investors; that Feathers did not account for the "notes receivable" of the Funds financial statements in accordance with GAAP; that Feathers explained how the "due from" recording would be deceptively used to absorb the Funds' expenses; and that Feathers disregarded advice from the

Funds' auditors and attorneys to cease selling loans between the Funds and readjust the "due from" accounting to be in accordance with GAAP.

Feathers also contends that he relied on the advice of professionals when drafting the offering documents as well as in executing the fund transfers, and that this reliance disproves the SEC's argument as to his scienter. Def.'s Opp'n at 16. In order to establish the affirmative defense of reliance on professional assistance, a defendant "must show that [he] (1) made a complete disclosure to [the professional]; (2) requested [the professional]'s advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice." SEC v. Goldfield Deep Mines of Nev., 758 F.2d 459, 467 (9th Cir. 1985) (citation omitted). Feathers neither points to nor provides any evidence to establish any of these elements. He only offers an unsupported assertion that he "acted with his professionals in good faith, and does not believe there were omissions of material information to these professionals, nor misrepresentations." Def.'s Opp'n at 16. As such, the Court rejects this argument.

Next, Feathers argues that he had obtained approval from investors to engage in the conduct the SEC contends underlies the securities fraud causes of action. First, Feathers asserts that SBCC "sought, and gained, consent from investors in May of 2012 for a change from GAAP basis accounting to tax basis accounting for the [F]unds." Def.'s Opp'n at 13. The only piece of documentary evidence Feathers provides and relies on in support of this contention is a letter purportedly to two IPF investors requesting this approval. See Feathers' Evidentiary Objections Ex. 10. However, this request fails to establish that Feathers actually received the approval from these and other investors to make this change. Furthermore, the letter fails to disclose that Feathers was actually causing IPF to make cash transfers and loans to SBCC in violation of the offering documents, as has been established by the SEC. Feathers also contends that SBCC had the "express authority to sell loans between the Funds, or to others and was doing so well before 2012." Def.'s Opp'n. at 19. Whether this authority was derived from the investors or the fund offering documents is unclear, as Feathers points to no specific and particular evidence confirming this

assertion. Feathers also asserts that "distributions to members, if they did occur in excess of fund profits, were not prohibited." Again, Feathers points to no evidence supporting this, and the Court has explained why the excess distributions were prohibited by the Fund documents.

Feathers also attempts to discredit several of the SEC's declarants. He argues that the "declarations of Jeff Spiegel and David Gruebele cannot have credibility" and that "[t]heir declarations, also, like those of Barbara Bushee and Robert Morris, appear to be heavily assisted by SEC." Def.'s Opp'n, at 7. Feathers also complains of not being able to depose them, arguing that only a jury can judge the credibility of declarations. Id. at 7–9, 15–16. However, "once the movant for summary judgment has supported his or her motion, the opponent must affirmatively show that a material issue of fact remains in dispute and may not simply rest on the hope of discrediting movant's evidence at trial." Frederick S. Wyle Prof'l Corp. v. Texaco, Inc., 764 F.2d 604, 608 (9th Cir. 1985). "Neither a desire to cross-examine affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment, unless other evidence about an affiant's credibility raises a genuine issue of material fact." Id.; see also Nat. Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983); cf. Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1220 (9th Cir. 1980). Here, Feathers offers no direct and incontrovertible evidence that the SEC's declarants are not credible; he only offers unsupported conjectures such as, for example, the assertion that Spiegel's and Gruebele's declarations are "very suspect" and that they are "suddenly seeing things very differently now." Def.'s Opp'n at 7. Accordingly, the Court rejects Feathers' arguments regarding the character and credibility of the SEC's witnesses who have signed and sworn their declarations under penalty of perjury.

Feathers brings forth several other arguments in opposition to the SEC's summary judgment motion. The Court disposes of these arguments by noting that Feathers has not supported them with a presentation of specific and particular evidence that demonstrates that there exists a genuine issue of material fact. See Keenan, 91 F.3d at 1279. Feathers has provided hundreds of pages of exhibits in support of his opposition as well as in support of his own summary judgment

motion; many of these exhibits include the Funds' offering documents, lengthy email conversations without any context, the same audit reports the SEC provided, and magazine clippings. Feathers fails, however, to indicate which specific pieces support his assertions that there exist questions of material fact with regard to the SEC's contentions. See id. To reiterate, it is not the task of the Court to comb through the record in search of genuine issue of triable fact. Id.; Carmen, 237 F.3d at 1029; Forsberg, 840 F.2d at 1417–18.

5. Securities Fraud Claims Conclusion

For the foregoing reasons, the Court finds that the SEC has presented sufficient evidence to establish the elements of its securities fraud causes of action: that Feathers made material misstatements, misrepresentations, or omissions of fact to investors regarding his and SBCC's management of the Funds; that such misrepresentations were made in connection with the offer or sale of a security—specifically, the investment securities in the Funds—by means of interstate commerce; and that the misrepresentations were made with the intent to deceive the investors and other parties or with extreme recklessness. The Court also finds that Feathers has not met his burden of demonstrating, with the support of specific and particular documentary evidence, that there exist genuine issues of material fact with regard to these elements. Accordingly, the Court GRANTS the SEC's Motion for Summary Judgment with regard to its allegations of securities fraud.

B. Broker-Dealer Registration

Section 15(a) of the Exchange Act makes it unlawful for brokers to offer securities without registering themselves with the SEC. See 15 U.S.C. § 78o(a)(1). The Act defines a "broker" to include "any person engaged in the business of effecting transactions in securities for the account of others." Id. § 78c(a)(4). Courts considering this definition have required a showing that there was a "certain regularity of participation in securities transactions at key points in the chain of

distribution." SEC v. Hansen, No. 83 CIV. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984); see also SEC v. Interlink Data Network of Los Angeles, Inc., No. CIV. A. 93-3073 R, 1993 WL 603274, at *10 (C.D. Cal. Nov. 15, 1993). Activities that may indicate that a person is a broker include, inter alia, that the person "1) is an employee of the issuer; 2) received commissions as opposed to a salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as to the merits of the investment or gives advice; and 6) is an active rather than passive finder of investors." Hansen, 1984 WL 2413, at *10.

Here, it is not disputed that Feathers and SBCC are the sole managers of the Funds, which technically were the issuers of the securities. Feathers and SBCC employed investor representatives who were paid a salary and a commission for sales of securities of IPF and SPF. See, e.g., Bulgozdy Decl. Ex. 175 at p. ii. Feathers and SBCC actively solicited new investments in IPF and SPF. See Morris Decl. ¶¶ 2–5, Ex. 131; Bulgozdy Decl. Exs. 215, 216. Moreover, Feathers and SBCC have been selling IPF and SPF securities regularly for years, with sales of at least $46 million of securities of these Funds. See Receiver's Preliminary Forensic Accounting Report, Docket Item No. 171, at pp. 2, 5. As such, the Court finds that Feathers and SBCC fall under the definition of "brokers" under Section 15(a) of the Exchange Act. Feathers has not presented evidence to the contrary nor evidence that introduces a genuine issue of material fact. As such, the Court GRANTS the SEC's Motion for Summary Judgment with regard to the claim of violation of the Exchange Act's broker-dealer registration provisions.

C. Control Person Liability

The Court also finds that the SEC has established that Feathers and SBCC are liable as control persons under Section 20(a) of the Exchange Act, which provides, "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as

such controlled person to any person to whom such controlled person is liable . . . ." 15 U.S.C. § 78t(a). A defendant may be liable for securities violation if (1) there is a violation of the Exchange Act and (2) the defendant directly or indirectly controls any person liable for the violation. SEC v. Todd, 642 F.3d 1207, 1223 (9th Cir. 2011). The SEC defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405; Todd, 642 F.3d at 1223 n.4. The definition of "person" under the Act encompasses a "company." Id. at 1223 (citing 15 U.S.C. § 78c(a)(9)). As the SEC has established, and Feathers has admitted, that Feathers controlled SBCC, IPF, and SPF, the Court finds that the elements for control person liability for securities violation have been met beyond a genuine issue of material fact. As such, the Court GRANTS the SEC's Motion for Summary Judgment with regard to this cause of action.

IV. Conclusion and Order

For the foregoing reasons, the Court finds as a matter of law that Defendants committed securities fraud in violation of Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act as well as Section 10(b) of the Exchange Act and Rules 10b-5(a), 10b-5(b), and 10b-5(c) thereunder; that SBCC operated as an unregistered broker-dealer in violation of Section 15(a) of the Exchange Act; and that Feathers and SBCC are liable as control persons under Section 20(a) of the Exchange Act. As such, the SEC's Motion for Summary Judgment is GRANTED.

Defendant Feathers' Motion for Summary Judgment is DENIED.

The SEC seeks the following relief against Feathers and Defendant companies: (1) permanent injunction prohibiting future violations of the federal securities laws; (2) disgorgement of ill-gotten gains (plus prejudgment interest) from the conduct at issue here; and (3) payment of civil penalties. Based on the findings of fact and law contained herein, the Court is prepared to grant appropriate relief to the SEC and will hear and consider argument from the SEC and

Defendants as to what remedies are to be granted and in what amounts. This hearing will be set for **October 22, 2013 at 1:30 p.m.** The SEC is ordered to file opening briefings on this matter by September 9, 2013; Defendants are ordered to file any opposition by September 20, 2013; the SEC is ordered to file its reply by October 11, 2013.

IT IS SO ORDERED.

Dated: August 16, 2013

EDWARD J. DAVILA
United States District Judge

(3)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
LOS ANGELES REGIONAL OFFICE
11TH FLOOR
5670 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036-3648

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February 28, 2014

VIA UPS

Mr. Mark Feathers
[redacted]

Re: ***In the Matter of Mark Feathers***
Admin Proc. File No. 3-15755

Dear Mr. Feathers:

In connection with the above-described Administrative Proceeding against Mark Feathers, the Division of Enforcement ("Division") is required by Commission Rule 230 of the Commission's Rules of Practice, 17 C.F.R. Section 201.230, to "make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings."

To meet our obligation under Rule 230, we are providing you with a copy of the documents that we would otherwise make available for inspection and copying. We are sending you an electronic copy of our complete file responsive to Rule 230 on two (2) DVDs enclosed herewith. Exhibit 1 to this letter contains an index of the documents on the DVDs. We have previously produced the majority of the documents to you and/or your counsel in the civil proceeding *SEC v. Small Business Capital, et al.*, Case No. 12-cv-03237-EJD, pursuant to Federal Rule of Civil Procedure 26, but to avoid any disputes about the completeness of our production, we are including those documents with this production.

In an Order Scheduling Hearing and Designating Presiding Judge issued February 25, 2014, this proceeding was assigned to Administrative Law Judge Carol Fox Foelak. That Order also provided that the hearing in this matter should commence at 9:30 a.m., Monday, March 24, 2014, in the Commission Headquarters Offices, Hearing Room 2, 100 F. Street N.E., Washington, D.C. 20549. It further orders the parties to confer and notify the presiding judge of a suggested date and time for a prehearing conference which will be conducted telephonically unless the parties prefer otherwise.

Commission Rule of Practice 221, entitled Prehearing Conference, sets forth the purposes of such a conference, the procedure, and the subjects to be discussed. We believe this case is appropriate for a prehearing conference, and will be requesting that the Administrative Law Judge conduct a prehearing conference.

Normally, the parties would file a joint status report with the Court in which they can, among other items, ask the Administrative Law Judge to convert the hearing date (in this case, March 24, 2014) into the date for the prehearing conference, and the parties can discuss with the Court a schedule going forward, the location of the hearing, motions for summary disposition, and the other matters in the Rule.

We would like to set up a call to discuss the possibility of a prehearing conference with you, and the items addressed in Rule of Practice 221. Please let me know your availability for a telephone conversation on these issues.

You can reach me at (323) 965-3322. Thank you in advance for your cooperation in this matter.

Very truly yours,

John B. Bulgozdy

John B. Bulgozdy

Enclosures: 2 DVDs

Exhibit 1 to letter dated February 28, 2014

BATES RANGE	DESCRIPTION	DVD
[redacted]	Documents produced by Spiegel Accountancy Corp	1
[redacted]	Documents produced by Small Business Capital Corp	1
[redacted]	Documents produced by Heritage Bank	1
[redacted]	Investor Questionnaires	1
[redacted]	Documents produced by Lee Emerson	1
[redacted]	Correspondence	2
[redacted]	Emails	2
[redacted]	Subpoenas	2
[redacted]	Testimony transcript and exhibits	2