Reply to Enforcement's Response to Respondent's "Motion for Summary Disposition" 3-15755

In its reply to Respondent's motion for summary disposition, dated 7-31-20, Enforcement states that Respondent did not file a motion, but that he "filed a document".

If, in fact, that is an accurate description by Enforcement, then it is not because Respondent holds any desire to waste this court's time. Respondent has not had the benefit of counsel for almost the entirety of civil and administrative law proceedings since his companies and his assets were seized in 2012 under seal, *ex parte*, *prima facie*, with the court allowing deference to Enforcement sealed pleadings which the court could not have possibly known were produced by Enforcement personnel by way of *judicial deception* at that time.

After Madoff and his grand and far reaching Ponzi scheme came to light, Enforcement could not squander its opportunity to employ the word "Ponzi" to its benefit. It did so by coining the phrase "Ponzi-like scheme" in subsequent civil actions. Never let a crisis go to waste, as some would say. And, Enforcement still continues to employ the phrase Ponzi-like scheme, for its prejudicial impact on courts, investors, and the public. It does this even though the legal terms "securities fraud", "wire fraud", "bank fraud", "conspiracy", etc., are all available, and all would surely provide adequate descriptions for legal purposes.

Attached is an article (exhibit) which appeared recently in a major San Francisco Bay Area newspaper. From a reading of the exhibit , it is clear that SEC continues to employ the prejudicial term for its benefit, and that the term impacts third party investors is also quite clear. In a civil filing of this date, Respondent has asked for a nationwide injunction to prevent Enforcement from continuing to use the phrase "Ponzi-like" for self-serving purposes (see attached). Respondent's civil pleading is not yet date-stamped by the Court. At this court's direction, Respondent will provide evidence of civil court submission, when Respondent has confirmation of filing by the clerk of the federal district court. Respondent asks the Court to take judicial notice of these items.

Respondent does not believe that "securities-fraud like" and "wire fraud-like" would likely be employed by courts in civil actions. Why is the term "Ponzi-like" accepted? Perhaps it also took some period of time after the Salem witchhunts for the descriptive term "witch" to no longer be used, too, as there appears to be no such thing as a "witch", at least in the figurative sense in which that word was employed by the evangelical persons of that era. SEC's employment of the term "Ponzi-like" has run its course. It should now be discontinued, at the direction of this court. By means of this reply, Respondent asks this Court to accept that the phrase Ponzi-like may cause evidentiary and prejudicial due process impediments to Respondents, bring harm to third parties as well, and on that basis ban its use by Enforcement.

Respectfully,

Mark Feathers, *pro se*, Respondent 8-14-20

Mark Feathers, *pro se*
[redacted]
Menlo Park, CA [redacted]
[redacted]
[redacted]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMISSION,

Plaintiff,

vs

SMALL BUSINESS CAPITAL CORP., et al

Case No.: CV12-03237-EJD

NOTICE OF MOTION AND MOTIONS FOR:

RULE 60 HEARING ON PRIOR ADVERSE SUMMARY JUDGEMENT

AND RELATED MOTIONS:

REQUEST FOR INJUNCTION ON PLAINTIFF ENJOINING AGAINST USE OF THE PHRASE "PONZI-LIKE SCHEME"

REQUEST FOR JUDICAL NOTICE ON MATERIALS ATTACHED TO MOTION, OR PRIOR CIVIL PLEADINGS SUBITTED

STAYING REQUIREMENT FOR DISGORGEMENT PAYMENTS

REQUESTING FUNDS TO COMPLETE A FORENSIC ACCOUNTING

DATE: OCTOBER 22, 2020 TIME: 9:00 A.M.
CTRM: 4 JUDGE HON. EDWARD J. DAVILA

MOTION AND NOTICE OF MOTION

TO THE HON. EDWARD J. DAVILA, JUDGE OF THE UNITED STATES DISTRICT COURT AND INTERESTED PARTIES:

Mark Feathers ("Defendant") in above captioned civil case hereby moves this Court for Orders:

1. Rule 60 Motion in favor of Defendant
2. Approval of an injunction against Plaintiff employing the phrase "Ponzi-like scheme" here or elsewhere
3. Request for Judicial Notice of:
    a. The Stalker Forensic Accounting Report of Defendant's investment funds prior submitted to Court
    b. The Receiver's Final Forensic Accounting Report and Final Reports to the Court

Defendant, who is *pro se*, preys from the court to be lifted from the burden of preparing Orders.

Rule 60 Motion to Reverse Prior Adverse Summary Judgement Against Defendant

I. SEC's June 2012 *ex parte* Sealed Claims as to a "Ponzi-like Scheme"

Legitimate questions are raised as to the reliability of the figures the Receiver presented to the court in July 2012. The Receiver had already been employed in a substantial number of SEC receiverships, at SEC's request, before and after Defendant's companies were seized. In the Receiver's First Interim Report (Docket 30, page 9), the Receiver claimed that "Investors appear to have unpaid principal balance of $46.083 million. Assuming all of these figures are ultimately verified, there will be a likely shortfall of $11.960 million" (equal to 26% of investor monies).

Seven years later, the Receiver states to the Court that "The final distribution will bring the total amount distributed to $35,300,215.97". Or, 87%, of investors capital (Doc. 1274, page 7). Losses to investors were $5,274,744 (13%). Of the "losses", Receiver and counsel's fees thru June 2016 were $4,547,782, with several hundred thousand more dollars in fees after that date. Clearly, 86% of the 13% loss to investors was due to the Receiver and his counsel's billings. Factoring in documented fees of the Receiver and his counsel, after 2016, of several hundred thousand dollars, it is likely that the Receiver and his counsel actually, employing their own reports to the court, account for 93 – 95% of the 13% loss to investors.

II. The Report on Defendant's Investment Funds of Annette M. Stalker, CPA/CFF, CFE

Subsequent to the adverse summary judgement against Defendant in 2013, a third-party forensic accounting was performed in 2016 on Defendant's investment funds (the "Stalker Report"). In her report, Stalker states, as to her qualifications:

"I am the owner of Stalker Forensics which is a Certified Public Accounting firm that provides forensic accounting and consulting services. I hold a Bachelor of Science degree in Business with a concentration in Accounting from California Polytechnic University in San Luis Obispo, California. I am a Certified Public Accountant, a Certified Fraud Examiner and am Certified in Financial Forensics. I have provided forensic, accounting, litigation support…since 1994." "…I have served as the Chair of the AICAP's Forensic and Litigation Services ("FLS") Committee. The FLS Committee provides guidance to AICPA Forensic and Valuation Services Section Members. "I serve…as a member of the statewide Steering Committee for the Forensic Services Section. I am also an instructor of Forensic Accounting at UC Davis Extension…".

Stalker's report shows no indication that it did not place full reliance in its findings a reliance for its findings on the same financing materials, and offering documents and operating agreements, which were used by SEC's Enforcement CPA, and Thomas Seaman, court appointed Receiver. Stalker points out not just variances from normal forensic examinations of SEC employees, and Seaman, but also material omissions from normal forensic examinations by both, as well. Questionably, SEC employees relied on the Receiver's reports. At worst, SEC deliberately pointed the court to wrongfully constructed findings of the Receiver they asked the court to employ. After Defendant's funds were seized by way of wrongful financial illustrations of SEC Enforcement CPA's, SEC never did again produce reports independently from SB Capital materials already held in SEC's possession from its earlier subpoenas in 2011-2012.

Stalker points out that SEC paralegal Sarah Mitchell created schedules for ledgers "*which were produced to the Commission by the Receiver*" (page 4 of 18). And, Stalker points out how Mitchell employed a method of summation of all check payments "collectively by the funds", but did not do the inverse, which was to show monies deposited in the fund's bank accounts. So,

not only did Mitchell not use materials held by SEC, she deviated from normal audit and reconciliation methods used by forensic examiners. Also, left unstated in Stalker's report, is why an SEC paralegal would be presenting financial analysis to the court in the first instance, instead of a party with a financial and forensics background. SEC presented no evidence to the court during earlier civil proceedings that their paralegal held qualifications to produce valid and reliable financial tables, charts, etc.

Stalker points out that "There is no reference to the GAAP-based audited financial statements for the Funds which reflect the financial transactions between the Fund and Manager as well as provide detail disclosure about the nature and timing of payments by the Fund to the Manager. And, whereas in its civil pleadings, SEC also made pointed and repeated references to Defendant's drawings on its "receivable", nowhere does SEC or the Receiver make reference to the fact that Defendant also made payments on that same receivable, on a timely basis and in accordance with the requirements of that Receivable (see Footnote 1, page 4 of 18, Stalker Report).

Other Stalker Findings:

- The Receiver used a cash-basis method of accounting that "inconsistent with the Funds' required Generally Accepted Accounting Principles ("GAAP") basis of accounting
- The Receiver "appears to have recreated accounting records on a cash basis…" when there were "GAAP-compliant audited financial statements available.". It is not clear why the Receiver did not use the audited financial statements and the underlying trial balance detail data from the external independent auditor, Spiegel Accountancy"…"as the source for the accounting analysis".

- In pointing out a major departure from normal audit work of Receiver's, and illustrating the shortcomings of the "cash" basis method used by Seaman, Stalker states when talking about the fund's receivable from the fund manager (of some $6M), "Under GAAP, those loans…are an asset of the Fund. Under Cash Basis, those funds represent an expense of the fund which decrease the net income or not proceeds on a Profit and Loss Statement. By employing "cash" analysis, Seaman thereby likely grossly misrepresented the fund's financial performance, as pointed to by Stalker.
- Stalker mentions, and provides detail, of other significant matters in the fund offering documents, such as:
    - That they "put the reader on notice about the authority and potential conflicts with the Manager SBCC", which is a substantial departure from SEC's sealed and uncontested complaint, which references the failure of SBCC to point to conflicts of interest.
    - That "The Advances/Payments to manager were fully disclosed in the Funds' Audit Reports
    - That notes in the Funds' audited reports disclose deails about the amount and terms of the note from the manager, including transparency approved by Defendant to investors and regulators by way of including details about the non-GAAP requirement to assess collectability of the receivable
    - That "related party transactions" such as the funds' receivable notes from the manager were fully disclosed under "Related Party Transactions" in notes to

their audited financial statements in 2011 and prior years, including the balance and terms of the note

- That the balance for the note receivable SPF actually "decreased from the prior year", reflecting adherence to note provisions by Defendant's companies
- That transactions in the tables of the CPA prepared audited financial statements were "consistent with the IPF Company General Ledger", demonstrating full disclosure of all financial information between SBCC and their accountants.
- That the funds' restriction on advances to the fund manager (Defendant) had been "amended and approved by the Department of Corporations"
- That any inconsistency in Defendant's auditor's representations in the audited financial statements was due to errors of Defendant's accountants, and not due to any deliberate instructions of Defendant to avoid transparency. Stalker states on page 12 of her report that "Counter to the auditor's notation in their workpapers regarding the offering circular" that "a portion of the funds advances as reimbursement…maybe reflected as a note receivable on the Fund balance sheet".
- That "The 2010 Audit Report Opinion was Qualified" in accordance with GAAP requirements, and not due to "Impropriety of Fund Advances", and or that it could not be properly recorded as an asset of the fund.
- That "Permission was obtained by the Manager from the Fund investors" to properly reclassify the capital cost "asset", and not that Defendant had hidden

expenses improperly, as conveyed by SEC and Seaman often throughout their civil pleadings.

- That "Despite several parts of the various offering documents which convey the broad authority…of the manager", that "..the Manager still sought to disclose and obtain investor approval of changes in the Fund operations and accounting", with specific detailed examples provided by Stalker within her report.

Contrary to the representations of SEC and the Receiver which preceded, and bolstered, SEC's request for adverse summary judgement, the Stalker Report throughout outlines inconsistencies with GAAP and GAAS of SEC's CPA, and Seaman, not of Defendant's information provided to investors. In closing her introduction to her report, Stalker states "My review of those documents is not yet completed."

Based on that, Defendant asks this Court to approve a completion by Stalker of her report. SEC and Seaman should pay for the completion of this report, from the $5M in fees paid to Seaman and to his counsel. Clearly, Stalker raises material questions in her preliminary findings of not only impropriety in the methods of SEC, but also of. The question that remains unanswered at this point is "why" did SEC and Seaman depart from normal forensic audit practices, and did their efforts cause there to be unconstitutional due process barriers to Defendant during civil proceedings? Defendant asks this court consider directing a referral of these matters to the United States attorney for a more thorough review of the inconsistencies of the findings of Stalker vs. those of SEC's CPA and the Receiver, Thomas A. Seaman.

Of additional note, at the time of SEC's motion for adverse summary judgement, federal agency U.S. Small Business Administration ("SBA") had pending a "claim" in excess of

$20,000,000 against the Receivership Estate. By the time of the Stalker Report, SBA dropped its claim by more than 99.8%, to less than $50,000, with no explanation provided by SBA in court records as to why their initial claim was more than four hundred times higher than their final settled claim against the Receivership Estate. Undoubtedly, SBA's claim, in the eyes of the Court, could only have had a substantial negative bearing on Defendant at the time of motion hearings on summary judgement, not any positive benefit whatsoever.

MOTION FOR NATIONWIDE ENJOINDER AGAINST SEC USING THE PHRASE "PONZI-LIKE"

The word "Ponzi" and any usage of same may bring harm to defendants, as well as to third party investors. This court recognized that fact early in civil proceedings, as evidenced by the court enjoining both parties to be cautious in words employed in ongoing proceedings. Yet, some twelve years after Madoff, SEC continues to employ this harmful term, on appearance entirely for its own benefit (See Exhibit 1). A close reading of Exhibit 1, a recent news article about an SEC "Ponzi-like" civil action, demonstrates that, even before civil pleadings and motion hearings are underway, that investors have already formed opinions in the absence of fully developed factual evidentiary proceedings. If even one party is harmed because of prejudicial opinions that form due to SEC's employment of the phrase "Ponzi-like", then SEC should be ordered to be discontinue this practice by this court. Are the terms "fraud-like" and "conspiracy-like" valid legal terms? There are already in existence and used by the courts proper, and suitable legal descriptions that SEC may use in filing civil actions and in their press releases.

MOTION FOR DEFENDANT TO DISCONTINUE DISGORGEMENT PAYMENTS

Defendant has experienced substantial difficulty in gaining employment since release from the U.S. Bureau of Prisons in late July 2019. He has twice declared bankruptcy due to SEC proceedings. And, Defendant has experienced physical conditions during the past year ([redacted]). Despite all this, Respondent has paid in excess of $23,000 restitution since his release. These payments present a hardship to Defendant, and [redacted] And, Defendant continues to be embroiled by SEC Administrative law proceedings (Mark Feathers, re: 3-15755). As SEC is the party that may determine in the future if Defendant may be able to have his disgorgement dropped, there is a conflict of interest here in that Defendant, on appearance, might suffer retaliation from SEC in the future if administrative law proceedings do not go in SEC's favor. For these reasons outlined, Defendant preys that this court now direct that Defendant may be able to discontinue his disgorgement payments at the present time, and make similar recommendation to the criminal court of Hon. Lucy Koh.

August 14, 2020

/s/ Mark Feathers

Mark Feathers, Defendant, *pro se*

Declarations and Statement of Facts:

I swear on my knowledge and belief that all matters outlined herein are accurate and truthful, from San Mateo County, CA.

/s/ Mark Feathers

Mark Feathers, Defendant, *pro se*

Proof of Service

I have served these papers on all papers by email on this date. I have mailed a paper copy to U.S. District Court on this date.

/s/ Mark Feathers

Mark Feathers, Defendant, *pro se*

Yalonda M. James / The Chronicle

Late Marin magnate investigated by feds

Real estate firms Ken Casey owned probed by SEC for alleged Ponzi scam

By Matthias Gafni

Robin Schild was so happy with his $250,000 investment, he mortgaged his house for $400,000 and sunk that too into Ken Casey's real estate investment firms that promised sky-high returns and came with even higher praise from friends.

Since investing in 2016, the Albany resident said he regularly received his monthly 9% interest payments deposited into his bank account and at one point withdrew $200,000 from his account with no problems. So he was shocked when he received a call from a friend and fellow investor who said all investments and interest payments had been frozen and federal regulators were investigating Casey's companies for running an alleged Ponzi scheme.

"It's like, do I need this in the middle of the worst epidemic in 100 years?" Schild said in an interview with The Chronicle. "I think I'll be lucky to get half of it back ... and I consider myself lucky because other people had everything they owned invested and I've heard there are people going on food stamps."

MarinGov.com via Twitter 2019

Top: Robin Schild, who invested in Ken Casey's companies, at his home in Albany. Above: Lori Frugoli, who got a $25,000 loan from Casey, is sworn in as Marin County district attorney in 2019.

The 63-year-old is one of more than 1,000 investors scrambling to recover hundreds of millions of dollars from the alleged Ponzi scheme involving Casey, who died in May from a heart attack. His admirers celebrated him as a Republican donor, philanthropist and adventurer who amassed an enormous portfolio of office parks and apartment buildings in Marin and Sonoma counties.

Shortly after his death at age 73, a law firm and accountant tasked with transferring his companies — Professional Financial Investors Inc. and Professional Investors Security Fund Inc. — to his ex-wife uncovered the allegations of fraud. They now question whether more officials from the Novato companies profited off the three decades of a "Ponzi-like operation," according to bankruptcy records reviewed by The Chronicle.

Forensic accountant Michael Hogan, who has been named chief restructuring officer for the companies, pored over the financial records

Ponzi continues on C6

"I consider myself lucky because other people had everything they owned invested and I've heard there are people going on food stamps."

Robin Schild, invested in Ken Casey's companies and expects to get some money back

BAY AREA

Feds probing late Marin re

Ponzi from page C1

and found the companies used new investor funds to pay off other investors' interest payments and other debts, according to his bankruptcy declaration.

Hogan estimates Casey's companies owned interests in about 70 real estate properties with an estimated worth of more than $550 million. However, those properties have debt exceeding $400 million and his companies owe more than $250 million to investors, he said in court records. Last month, both companies filed for bankruptcy.

"Over a period of at least three decades, Mr. Casey appears to have operated a fraudulent scheme in which investors loaned funds to the Companies, with a significant portion of those funds being used to service the debt owed to existing investors and to personally enrich Mr. Casey himself," Hogan said. "Others associated with the Companies also appear to have been involved and benefitted from the scheme, and this investigation is ongoing."

The SEC initiated its investigation on May 28, he said. An SEC spokeswoman declined to comment.

Casey started his companies in 1983, serving as the sole officer until 1998. He maintained complete control of the companies until his death, Hogan said.

He divorced his wife, Charlene Albanese, in 1996, but left

Yalonda M. James / The Chronicle

Robin Schild of Albany invested heavily in the real estate companies owned by the late Ken Casey, Marin County's largest commercial property owner, who allegedly ran a Ponzi scheme.

her the companies. In a statement to The Chronicle, Albanese said she hired lawyer Eric Sternberger two days after Casey's death to review the corporate finances.

"Mr. Sternberger discovered a variety of improprieties, after which I directed the company to self-report to the SEC, which then began its investigation," she said. "Funds were frozen to preserve them for the investors, except those relating to bank debt and normal operating expenses, and all officers were removed.

"Company operations are stable, Chapter 11 has been filed, and I am resigning from the director position so professionals and creditors can appoint a qualified independent director," she continued. "I am heartbroken and sick to my stomach that so many investors, myself included, have been devastated by Ken's actions. Like all of the other investors, I am waiting to see what can be preserved."

Hogan also reported in his recent bankruptcy declaration that the companies' former CEO, Lewis Wallach, "may have also benefited from the manner in which Mr. Casey ran the Companies."

Last month, the law firm reached an agreement with Wallach to return $1 million from an LLC that he controlled, and is waiting for him to return two properties with several million dollars in equity, Hogan

eal estate magnate

said.

Property records show Wallach owning an Encino (Los Angeles County) home with his wife purchased more than a decade ago for $3.5 million. They also indicate Wallach owned a beachfront Malibu property that is now renting for $30,000 a month.

A woman answered the phone Monday and took a message for Wallach. He did not return the call.

At Casey's passing, Marin County officials hailed him as the largest commercial property owner in the county in an article by the Marin IJ, which first broke the stories of the alleged scam. He was regaled as a philanthropist and an adventurer, who Herb Caen once wrote about in 1995 when he was training to become the 13th man to reach the North Pole by dog sled.

However, he had past legal troubles. In 1997, Casey pleaded guilty to one count of conspiracy to defraud the federal government, five counts of tax evasion and filing false tax returns, and 41 counts of bank fraud. He was sentenced to 18 months in prison, according to court records.

Casey had recently become active in donating to Republican causes, including a $300,000 donation from Casey's companies to a committee created to advocate for the repeal of the state's gas tax. He also donated to Travis Allen's and John Cox's unsuccessful runs for governor.

In October 2018, he loaned Marin County District Attorney Lori Frugoli $25,000, just 13 days before the election that she would win by a few hundred votes.

"She asked me for a loan and I said sure," Casey told the Marin IJ at the time. "I'm not supporting her to get out of any parking tickets."

Frugoli told The Chronicle on Monday that in May she repaid the loan in full "prior to any of the recently discovered information about PSIF Inc."

"Mr. Casey was a friend of my late husband and I knew of Mr. Casey through his service on the Marin County Human Rights Commission," Frugoli said in an email. "Like many others, I was shocked to learn of the allegations which have surfaced. Mr. Casey never attempted to 'curry favor' from me or my office."

As for Schild, he said he was introduced to the company by a friend and he only spoke a few times to Casey over the phone and found him friendly. He said he'd likely have to sell his Oakland condominium to pay off his debt.

"It's all dependent on getting fresh suckers," Schild said. "And there's not an infinite supply of suckers."

Matthias Gafni is a San Francisco Chronicle staff writer. Email: matthias.gafni@sfchronicle.com Twitter: @mgafni