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MARK FEATHERS
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 MARK FEATHERS,

15 Defendant.
16

Case No. CR 14-0531 LHK

**DEFENDANT'S SENTENCING
MEMORANDUM**

17 Defendant Mark Feathers hereby submits the following memorandum for the Court's
18 consideration in connection with his upcoming sentencing. He has no objections to the guidelines
19 calculation or the factual statements in the Presentence Report ("PSR").

20 While Mr. Feathers agrees with the Probation Office's conclusion that a variance is
21 justified and appreciates its recommendation of 27 months, he will respectfully ask the Court to
22 sentence him at the low-end (21 months) of the agreed-upon range. Such a sentence is justified
23 by the nature of the offense conduct, the fact that the circumstances of Mr. Feathers's life and
24 career show this offense to be an aberration, and by the conclusion that no interests of society (or
25 of justice) would be furthered by more prison time.
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1 **I. NATURE OF THE OFFENSE CONDUCT**

2 In 2014 Mr. Feathers was accused of running a “Ponzi” scheme and charged with 29
3 counts of securities and mail fraud. More than three years later, in exchange for a guilty plea to
4 one mail fraud count, the government has agreed to dismiss the remaining 28 counts. We offer
5 the following background on the case and the defendant’s business – not to unduly minimize Mr.
6 Feathers’s admitted offense conduct, but rather to give the Court context, in this very complex
7 case, regarding what allegations of the Indictment are not covered by the plea agreement.

8 A. Mr. Feathers’s Business

9 Mr. Feathers founded two investment funds, the Investors Prime Fund (in 2005) (“IPF”) and the SBC Portfolio Fund (in 2007) (“SPF,” with IPF, the “Funds”). Accredited investors
10 purchased Units to share in the Funds’ profits, pursuant to offering documents (filed with the
11 California Department of Corporations (“CDC”)) and a Subscription Agreement. The funds were
12 managed by Mr. Feathers’s Small Business Capital Corporation (“SBCC”).
13

14 IPF and SPF invested in real estate loans made to small businesses under programs run by
15 the Small Business Administration (“SBA”). Indeed, Mr. Feathers became one of 14 nationally
16 licensed SBA lenders under the 7(a) program. SBA real estate mortgages can be attractive
17 investments, largely because about 80% of the principal is government-guaranteed. The loans
18 must be underwritten in accord with SBA guidelines, to which Mr. Feathers adhered (and which
19 is why the SBA does audits). Such guaranteed loans are, not surprisingly, frequently sold at a
20 premium into secondary markets (as Mr. Feathers did).

21 The Funds entered into Operating Agreements with SBCC, pursuant to which SBCC
22 provided management services to each of the Funds (such funds typically do not have their own
23 employees). These Operating Agreements were disclosed along with the Funds’ offering
24 documents and, among other things, explain what moneys SBCC was entitled to receive from the
25 Funds. The offering documents were replete with disclosures about the potential risks and
26 conflicts of interest that could arise from the dealings among the Funds and SBCC.

27 IPF and SPF were professionally and carefully papered and operated. The Funds’ offering
28 documents were prepared by experienced law firms and reviewed by the CDC before it allowed

1 them to go effective. The Funds' financial statements were audited by an independent CPA firm,
2 with whom Mr. Feathers communicated about some of the very items in the Indictment. The
3 Funds were also subject to audits by the SBA and had their financials reviewed by federal
4 banking authorities as well as by California regulators.

5 The offering documents told fund investors what the Manager (SBCC) would do and how
6 it would make money. For instance, the IPF offering document effective June 11, 2009 states:

7 The Fund will engage in the business of purchasing loans secured
8 by first deeds of trust that encumber commercial real estate located
9 primarily in California.

10 The Manager and its affiliates will receive origination fees payable
11 by the borrowers on Fund loans arranged by the Manager and its
12 affiliates . . . [as well as] . . . loan processing and documentation
13 fees associated with loans arranged by Manager and its affiliates.

14 It is anticipated that all Fund loans will be "serviced" by the
15 Manager, which will also act as a loan broker in the initial
16 placement of Fund loans. The manager will be compensated for
17 such loan servicing activities.

18 The Manager shall receive subordinated monthly distributions
19 from the Fund in amounts equal to the remainder of funds
20 available for distribution after all Fund expenses and all allocations
21 of Member Preferred Return have been made to the Members. The
22 distributions to the Manager are in recognition of the services it
23 performs as the servicer of Fund loans and as Manager of the
24 Fund, generally.

25 As noted, the Funds' investors would get profits from the loans according to the number
26 of Units owned; this return was described, for IPF investors, as the "Member Preferred Return,"
27 which was the greater of 7.5% or the prime rate. Investors could choose to take their profits in
28 cash or to have them reinvested. The member return was not a guaranteed amount; 7.5% was a
target. If IPF made only, say, 5%, that's what investors would get. But if IPF made 12%, the
investors would get 7.5% (and the rest would go to SBCC).

The offering documents warned investors that:

NO PERSON HAS BEEN AUTHORIZED IN CONNECTION
WITH THIS OFFERING TO GIVE ANY INFORMATION OR
TO MAKE ANY REPRESENTATIONS OTHER THAN THOSE

1 CONTAINED IN THIS OFFERING CIRCULAR, AND ANY
2 SUCH INFORMATION OR REPRESENTATIONS SHOULD
3 NOT BE RELIED UPON.

4 In signing the subscription agreement, SPF investors certified that: "I have received, read, and
5 fully understood the [Private Placement] Memorandum and in making this investment I am
6 relying only on the information provided in the Memorandum. I have not relied on any
7 statements or representations inconsistent with those contained in the Memorandum." IPF
8 investors made similar representations in their subscription agreements.

9 **B. Indictment Allegations to Which Mr. Feathers Did Not Plead Guilty**

10 **1. Mr. Feathers Did Not Fraudulently Promise a "Guaranteed" Return**

11 The Indictment alleges investors were told they "were to receive" a certain return
12 (Indictment ¶¶ 14, 16), or that the Funds "would pay" a certain return (Indictment ¶ 23). As
13 explained here, Mr. Feathers did not admit to offense conduct involving a guaranteed return
14 because no such promise was made.

15 The disclosures in the offering memoranda cautioned investors that they should not invest
16 unless they "can bear the loss of their entire investment" because of the "significant degree of
17 risk" involved. For example, IPF's offering circular warned investors that "[t]he Member
18 Preferred Return is not guaranteed by the Fund or the Manager or anyone else." The warnings
19 are succinctly repeated in the document: "[t]he Member Preferred Return is not guaranteed by the
20 Fund, the Manager or any other party, and is also non-cumulative from year to year." Sales
21 collateral, filed with the CDC, conveyed the same warning. For example, one advertisement
22 IPF's attorneys submitted for CDC review, by letter dated May 26, 2010, touted an annualized
23 percentage yield of 7.00% but warned: "Actual returns may vary. No APY or preferred return is
24 guaranteed and past performance is no indication of future results."

25 **2. Mr. Feathers Did Not Fraudulently Cause the Funds to Make Millions of Dollars**
26 **in Loans to His Management Company in Violation of Offering Documents**

27 The Indictment alleges Mr. Feathers caused the Funds to transfer millions (in the form of
28 loans) to SBCC in a way directly contrary to what was disclosed to investors. This is not part of

1 the plea agreement conduct.

2 IPF made advances to SBCC. As described in the offering documents, SBCC was entitled
3 to syndication, organization, and operational expenses from the Funds for its work managing
4 them. The advances from IPF to SBCC were characterized in IPF's financials as a loan to SBCC,
5 specifically recorded as a Note Receivable. The Funds' accountant, Spiegel Accountancy Corp.,
6 got comfortable with characterizing those transfers as a Note Receivable though, as explained
7 below, issued a qualified audit opinion with the Funds' restated financials.

8 The Indictment alleges that Mr. Feathers secretly and fraudulently caused IPF to issue this
9 Note Receivable to SBCC because the Funds' disclosures told investors the Funds were
10 "generally prohibited" from making loans to the management company. (Indictment ¶ 24). This
11 "prohibition" was supposedly contained in the following disclosure:

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

16 But the disclosure's context – where it is placed in the offering document – makes clear that only
17 *mortgage* loans were prohibited and not the sort of loan reflected by the Note Receivable.

18 We know the disclosure pertains only to mortgage loans because it appears in a section of
19 the offering circular entitled "Fund Business and Lending." The Funds' business was, as noted,
20 originating federally guaranteed real estate loans. Under that section, the subsection in which the
21 above statement appears is entitled "Lending Standards and Policies." Of course, it is referring to
22 lending standards for the Funds' business (i.e., real estate loans). And under that subsection, the
23 sub-subsection in which the above statement appears is entitled "General Standards for Mortgage
24 Loans." There are several numbered paragraphs under that sub-subsection, one of which is the
25 above disclosure (the other paragraphs also pertain to mortgage loan issues).

26 The Funds' accountant, Spiegel, eventually decided the use of the Note Receivable was
27 not proper GAAP accounting. On March 22, 2011, Spiegel issued a qualified audit opinion with
28 the restated fund financial statements for 2009 and 2010 stating that that part of the financials was

1 not according to GAAP because the collectability of the Note could not be determined (thus
2 impairing the asset). Notes 10, 11, and 14 of IPF's audited financials refer specifically to the
3 Note Receivable and tell investors that the Fund "does not account for its note receivable"
4 according to GAAP. Note 11 explicitly discloses that "the note is unsecured." And, as Spiegel's
5 letter disclosed: "In our opinion, except for the effects of not assessing the collectability of the
6 note receivable from the fund manager the consolidated financial statements referred to above
7 present fairly, in all material respects, the financial position of [IPF]. Thus, the allegations from
8 the Indictment that Mr. Feathers "failed to disclose" that the loans reflected in the Note
9 Receivable were "unsecured" and failed to disclose "the Funds were not able to assess the
10 collectability of these receivables" (Indictment ¶ 24) are not part of the conduct covered by the
11 plea agreement.

12 Finally, as PSR ¶ 7 notes, the \$5.5 million advanced to SBCC under the Note Receivable
13 is a cumulative number. It is important for the Court to note that the amount of the Note
14 Receivable did not exceed what the Fund documents authorized. Spiegel's draft audit of IPF's
15 2011 books show that the Note Receivable had reached roughly \$4.8 million as of January 2012.
16 The IPF offering circular effective as of June 29, 2011 told investors advances under the note
17 receivable could be:

18 up to 1% of the Fund's maximum capitalization of \$500 million or
19 up to \$5,000,000, which may represent more than 1% of the
20 Fund's capital depending on total capitalization at any given time.

21 The Fund's "maximum capitalization" as described in its then-effective disclosure documents was
22 \$500 million.

23 Finally, the Indictment alleges Mr. Feathers "represented to investors" that the "monies
24 [they] deposited with the Funds . . . would not be used to fund the **operations** of SBCC."
25 (Indictment ¶ 18 (emphasis added)). This is not part of the predicate conduct in the plea
26 agreement. The June 2010 Offering circular for IPF, for example, specifically discloses:

27 [T]he Manager [i.e., SBCC] may receive up to 1% of the funds
28 maximum offering amount invested to cover its **operating**
expenses, marketing, and other overhead items. (*emphasis added*)

1 The Operating Agreements between the Funds and SBCC similarly disclosed that SBCC could
2 be reimbursed for “operating expenses.”

3 3. Inter-Fund Transfers of Loans at a Premium

4 The Indictment alleges that between February 2012 and May 2012, Mr. Feathers secretly
5 caused IPF to purchase nine mortgage loans from SPF at “substantial premiums,” and then used
6 those “inflated” premiums to pay management fees to SBCC. (Indictment ¶ 25.) It further
7 alleges that Mr. Feathers “failed to disclose these inter-company transactions, at inflated prices,
8 designed solely to funnel investor funds” to himself and SBCC. (*Id.*)

9 These allegations are not part of the conduct covered by the plea agreement. The inter-
10 Fund purchase and sale of mortgage loans at a premium was disclosed. For example, the January
11 28, 2011 Offering Circular for IPF authorizes IPF to purchase loans at a premium:

12 7. Purchase of Loans from Affiliates. **Existing loans funded or**
13 **acquired by the Manager or its affiliates may be purchased by**
14 **the Fund.** The Fund may also purchase loans from third parties. All
15 loans purchased by the Fund must satisfy the lending guidelines
16 described above. Generally, the purchase price to the Fund for any
17 such loan will not exceed the par value of the note or its fair market
18 value, whichever is lower, but the **Manager may purchase loans**
for a premium if the Manager believes the total purchase price
is fair and reasonable and in the best interest of the Fund.
(emphasis added)

19 In addition, the August 2011 SPF operating agreement permitted the sale of the loans to IPF:

20 Sale of Loans to Manager or Affiliate. The Company [SPF] may sell
21 existing loans to the Manager or its Affiliates [IPF], but only so long
22 as the Company receives net sale proceeds from such sale in an
23 amount equal to the total unpaid balance of principal, accrued interest
24 and other charges owing under such loan, or the fair market value of
25 such loan, whichever is greater . . .

26 Mr. Feathers did not, then, “fail[] to disclose these inter-company transactions.” (Indictment ¶
27 25.)

28 Nor is the allegation that the loan premiums in those transfers were “inflated” or
fraudulent part of the plea agreement conduct. First, that the loans would fetch a premium in the
secondary market is not unusual since they represented government-guaranteed cash flow. As

1 part of his wind-down of the Funds in the civil enforcement case, the court-appointed receiver
2 sold the same types of loans from the Funds two years after the purchases at issue here (i.e., two
3 fewer years of cash flows ahead of them) and obtained premiums of 10%.¹ Second, Mr. Feathers
4 and his employees calculated the amount of the premiums using commonly-accepted practices in
5 the SBA loan industry: the premiums were based on a formula using the values of the loans
6 themselves, including the loan balances; the loan's remaining life-spans; prepayment penalties;
7 and the SBA guarantees.

8 Finally, SBCC was in any event entitled to the premiums it received. The money did not
9 get transferred to SBCC from SPF until Mr. Feathers confirmed that SPF Members had already
10 received their year-to-date "Member Returns" of 7.5%. As the fund disclosures told investors,
11 after they were paid their year-to-date return, all fund profits generated above that, including the
12 premiums SPF got from the loan sales, were profits to which SBCC was entitled.² Mr. Feathers
13 confirmed, at the end of each month from February 2012 to May 2012 when IPF purchased the
14 nine loans from SPF, that the SPF Members had received their maximum monthly returns and the
15 remaining profits rightfully belonged to SBCC. SBCC's QuickBooks account records show that
16 the SPF investors, through May 2012, did receive their maximum year-to-date distributions.

17 4. The Plea Agreement Does Not Cover a Secret "Ponzi" Scheme

18 The allegation in the Indictment that Mr. Feathers secretly engaged in a "Ponzi" scheme
19 (Indictment ¶ 23) is not part of the conduct covered by the plea agreement. The Ninth Circuit has
20 explained that the "fraud [in a Ponzi scheme] consists" of secretly "transferring proceeds received
21 *from the new investors to previous investors*, thereby giving other investors the impression that a
22 legitimate profit-making business opportunity exists, where in fact no such opportunity exists."
23 *Hayes v. Palm Seedlings Partners-A*, 916 F.2d 528, 531 (9th Cir. 1990) (*emphasis added*).

24
25 _____
26 ¹ The premiums on the nine loan sales here were between 3% and 7%.

27 ² The offering documents and operating agreements disclosed that fund profits were first
28 allocated on a monthly basis to the Members *up to* the amount of the Member Return (SPF) and
all profits over those amounts went to the Manager, SBCC.

1 But Mr. Feathers told his investors what he was doing. The offering circular for IPF
2 stated, “[t]he Fund will not set aside any funds to satisfy requests for withdrawals or redemptions
3 from the Fund. *A new investor’s subscription may be used in whole or in part to fund*
4 *withdrawals or redemptions.*” (*emphasis added*). New investors were told that their money could
5 be used to pay previous investors who were taking profits (or money) from the Fund as
6 withdrawals or redemptions.

7 Another hallmark of a Ponzi scheme is that “investors are *promised* large returns for their
8 investments.” *Sender v. Nancy Elizabeth R. Hegglund Family Trust*, 48 F.3d 470, 471 n.2 (10th
9 1995) (*emphasis added*). That false promise causes a defendant to scramble to pay investors that
10 guaranteed return (by using new money if there are no profits) so that investors don’t discover the
11 fund can’t pay the return (and that they have been defrauded). But that didn’t happen here. As
12 we showed above, there was no promise of a guaranteed return: “Fund profits allocated to
13 Members for any calendar year [could be] less than the Member Preferred Return.” There was
14 thus no incentive to hide a lack of profits, or an inability to pay high promised returns by secretly
15 paying existing investors with money from new investors (and that was his state of mind).

16 Finally, there were disclosures around distributions to investors. As the offering
17 documents describe, profits were first allocated on a monthly basis to the Members *up to the*
18 amount of the Member Preferred Return of 7.5% per year. The Manager (SBCC) did not get a
19 share of profits until the Members had been paid their monthly profit allotment (i.e., 7.5% divided
20 by 12). The Fund documents not only warned that no amount of return was guaranteed, but also
21 told investors that “[a]ny cash distributed to Members may constitute, wholly or in part, return of
22 capital.” In other words, investors were explicitly told that cash they receive in monthly
23 distributions might be their own capital instead of profits, lest they think a particular distribution
24 signaled that the Fund was more profitable than it actually was. And in the offering circular
25 effective June 29, 2011, for example, it is stated that “[t]o the extent cash distributions exceed the
26 current and accumulated earnings and profits of the Fund, they will constitute a return of capital
27 and each Member will be required to reduce the tax basis of his Units.”

28 ///

1 **II. CHARACTERISTICS OF THE DEFENDANT**

2 By virtually any measure, Mr. Feathers has otherwise led the life of a law-abiding and
3 productive member of our society. The son of an enlisted sailor in the Navy, his family moved
4 often, depriving Mr. Feathers and his two brothers of the stability that childhoods spent in a single
5 location often provide. Despite that, he persevered. Following in his father’s footsteps, he served
6 his country for four years as an officer in the Navy. He left only after receiving a 100% disability
7 discharge owing to psoriatic arthritis. He then entered the world of banking, where he slowly
8 rose to vice president positions, often in regional banks helping small businesses obtain loans. He
9 also served the public for three years at the Small Business Administration. During all that, he
10 started a family and has been a loving and supportive father to his twin boys, now 15 years old.

11 We offer these and a few other perspectives on Mr. Feathers for the Court regarding his
12 family life, his work history, and his character, drawn in part from the sentencing letters of
13 support submitted by individuals from all walks of Mr. Feathers’s life, including some from
14 investors in the Funds.

15 A. Family Impact

16 A sentence longer than absolutely necessary will harshly impact Mr. Feathers’s family.
17 The seizure of the business by the SEC had already taken its toll on the Feathers family before
18 this case. Mr. Feathers and his then-wife Natalie threw themselves into the business to get it up
19 and running. Natalie quit a high-paying job in banking to join Mark in the family business, they
20 mortgaged their house, they worked seven days a week, and they invested their life savings into
21 the business. The stress of the long litigation with the SEC, where Mr. Feathers was compelled to
22 represent himself because his assets had been seized, and the Indictment took its toll on the
23 Feathers’ marriage. They had to sell their Los Altos home to avoid foreclosure.

24 But the biggest concern now is that an unnecessarily long sentence will be very hard on
25 his twin boys, now age 15. According to the family’s nanny of 14 years, Kathleen Boynton, Mr.
26 Feathers “has always been a dedicated family man, not only to his sons but also to his step-son.”
27 He included the family in business events. Mr. Napoli, one of the fund investors, noted how
28 investors would be invited to join the Feathers family “on fun outings.” One of Mr. Feathers’s

1 former employees, Jason Parsons, writes that even though Feathers worked very hard, he “made
2 time with his family.” On a typical Monday at the office, conversation would turn to “where he
3 took his two young twin boys, whether it was over to the San Mateo coastline, camping in the
4 mountains, or other outdoor activities.” Anton Haramis, a real estate developer who obtained
5 multiple loans from Mr. Feathers, writes that as he “got to know Mark on a personal level over
6 the years,” he “observed him to be a good person, a great father and an upstanding member of his
7 community.”

8 Ms. Boynton notes how at this time “his boys are [Mark’s] main concern and he is sorely
9 missed in their lives.” She still sees the Feathers boys, who have just started high school, and has
10 “experienced first hand just how much his absence has been felt by” them, particularly given “the
11 changes a young man goes through at that age.” One of the twin boys was born with spinal
12 meningitis and faces the additional challenges of cerebral palsy, hydrocephalus, migraines,
13 seizures, knee braces, and back straps. He shouldn’t have to face those challenges without a
14 father any longer than justice demands.

15 B. Work History and Accomplishments

16 According to former colleagues, employers and employees, Mr. Feathers not only did well
17 in his job, he also did a lot of good. He developed a deep reservoir of goodwill in his professional
18 relationships. Joe Garrett, then-CEO of Sequoia National Bank, for whom Mark worked running
19 the small business lending program in about 2001-2003, says he “would absolutely hire him
20 again, even knowing what has happened here.” According to Alex Espinosa, a colleague going
21 back to the Sequoia days, it’s “not an exaggeration to say that singlehandedly Mark Feathers got
22 that bank to profitability by doing government guaranteed loans.”

23 Richard Jones was a long-time SBA official and Mark’s boss in the early 1990’s, before
24 Mark left to do SBA lending in the private sector. He notes that Mr. Feathers “always had a good
25 reputation within SBA for his marketing and underwriting skills.” Indeed, Mr. Feathers’s
26 company became an SBA Preferred Lender; it’s the highest status an SBA lender can have since
27 the agency “delegates [its] approval [authority] to the” company. As Mr. Jones notes, Mr.
28 Feathers “satisfied [SBA’s] audit requirement for many years. Mr. Jones was so impressed that,

1 after he retired from the SBA in 2011, he went to work as a loan underwriter for one of Mark's
2 funds.

3 Mr. Espinosa, who interacted with Mr. Feathers in various capacities over the last twenty
4 years, noted how he "did his job very well" at a start-up bank, United American Bank, after
5 Sequoia. Mr. Espinosa had been retained as a consultant some years after Mark left that bank to
6 audit its SBA portfolio. His conclusion: the "loans done during Mark's tenure were meticulous,
7 without even a hint of deficiency or delinquency and could serve as textbook examples."

8 One former employee, Peter Eberle, tells the Court not only was Mr. Feathers "highly
9 regarded" for his SBA work, but he "was able to provide financing for many small business
10 owners who might otherwise have gone out of business or who would not have been able to
11 expand their businesses." One of those business owners, Jim Gardner of Jim Gardner
12 Construction, Inc., is still grateful to Mr. Feathers for an SBA loan he helped him obtain fifteen
13 years ago. He has written in support of Mr. Feathers: that loan "provided critical working capital
14 that allowed me to purchase equipment for my construction business that allowed me to expand
15 my operations in the East Bay." Another borrower, architect William Maston, writes to the Court
16 that his company "would not have the successful hotel project we have today" if not for Mr.
17 Feathers's help and professionalism during a time when credit markets were tight. Mr. Haramis,
18 the real estate developer, describes Mr. Feathers as "an ethical true professional" who, as a lender,
19 "went above and beyond the service level of other banks." He describes how Mr. Feathers was
20 "thorough and careful, and unlike many other bankers was always available and accessible."

21 The Court can see why there has been no allegation that Mr. Feathers's SBA nationally-
22 licensed lending business was illegitimate or not fully above-board. One indicator of this is that,
23 as noted, the receiver in the SEC case was able to sell the loans in Mr. Feathers's portfolio for a
24 10% premium even after years of litigation. On the same score, former colleague Mr. Espinosa
25 wrote to the Court that he'd filed a FOIA request and interviewed someone at the company that
26 had purchased the loan portfolio. He learned that the portfolio "has performed extremely well"
27 and had "no delinquencies, deficiencies, defaults, denials of guarantees or other irregularities."
28

1 C. Character

2 Statements from people who wrote in support of Mr. Feathers, and a couple of illustrative
3 vignettes they offer, should help to convince the Court that the offense conduct here is an
4 aberration. It does not reflect on the life he has led or that he will resume upon his release.

5 Those who wrote to the Court describe Mr. Feathers's honesty in his business dealings.
6 Former employee Mr. Parsons describes the "opportunity for cutting corners and questionable
7 business practices" that would be difficult for the SBA to detect, but "Mark was a stickler for the
8 rules, SBA or otherwise." Former colleague Mr. Espinosa says "Mark would have none of it"
9 when faced with the chance to cut a regulatory corner. Former colleague Mr. Jones describes
10 how "Mark and his staff continued to maintain the integrity of loanmaking." Anton Haramis, one
11 of Mr. Feathers's borrowers, with whom he did 6-8 loans over 15 years, has written to the Court
12 that he found him in their dealings to be "on both professional and personal levels, an intelligent,
13 ethical, and responsible man."

14 Mr. Feathers was committed to his bank employers and took seriously the obligation to
15 safeguard customers' money. Mr. Garrett attaches an American Banker article with his letter to
16 the Court reporting how, with the help of some other Sequoia National Bank employee, chased a
17 bank robber through the streets of San Francisco, ultimately catching and restraining him until
18 law enforcement arrived. This level of commitment is consistent with Mr. Eberle's statement that
19 "Mark cared about his employees and his investors." Mr. Haramis feels that Mr. Feathers "was
20 looking out for his investors" when he started the Funds.

21 Mr. Feathers was known for being equitable and fair to his borrowers like Messrs.
22 Haramis, Maston, and Gardner. Mr. Haramis, for one, emphasized how, in the aftermath of the
23 2008 credit crisis, Mr. Feathers "did not alter his rates" and "continued to behave like the straight,
24 stand-up guy that he is." Mr. Espinosa calls Mark "protective" toward his borrowers.

25 Mr. Feathers treated his employees "fairly and generously," according to Mr. Espinosa,
26 who "personally witnessed [Mark] giving bonuses to his support staff out of his own pocket."
27 Mr. Parsons, a five-year employee of Mr. Feathers, tells the Court he "treated his employees with
28 honesty and fairness." Mr. Parsons says Mr. Feathers "was big on character" and could

1 appreciate it in others. He recounts an incident he witnessed, a vignette Mr. Espinosa also tells,
2 about Mr. Feathers being at a movie theatre and seeing an usher, about four feet tall, being bullied
3 and teased by some young men. As Mr. Parsons says, “Mark walked up to him, handed him his
4 business card, and offered him the opportunity to come in for an interview.” Peter the usher aced
5 the interview and “Mark created a position for Peter, and gave him an opportunity to gain
6 experience in the finance industry which he may not have otherwise been afforded.”

7 Mr. Espinosa says Mr. Feathers “always spoke very well of his investors and the few that
8 I met seem to like him a lot.” The Court has received letters of support from investors. One of
9 them, Mr. Gidwani, tells the Court he was “completely satisfied with the way he managed the
10 funds” and came to “admire him for his integrity.” Mr. Gidwani says he even offered to help Mr.
11 Feathers “by contributing toward his defense but he refused that help.” Another investor, Mr.
12 Napoli, a retired school official on a fixed income, says he “believed in Mark Feathers when I
13 invested with him nearly 10 years ago, and I still believe in him.”

14 **III. A SENTENCE AT THE LOW END OF THE AGREED-UPON RANGE IS**
15 **APPROPRIATE AND FAIR**

16 Mr. Feathers’s six-year-long journey defending himself against civil and criminal charges
17 levied against him by the government is coming to an end. It has exacted a steep price. He’d
18 once had a long and successful career in SBA lending. Then he was forced to fight the SEC in a
19 complex case without the services of an attorney. His business was seized in *ex parte*, sealed
20 proceedings because of a suspicion he was running a Ponzi scheme. As it turns out, his Funds,
21 when seized, held over \$14 million in cash and about \$40 million in assets, hardly the hallmarks
22 of a Ponzi scheme. While attempting to defend himself and his business in those proceedings, he
23 was indicted. He had to sell his home to cover his debts. His wife is divorcing him. And he’s
24 been in the Glenn Dyer jail for almost a year, under conditions quite different than those
25 prevailing at a federal prison.

26 We know that 18 U.S.C. § 3553(a)(2) requires a sentence to be “not greater than
27 necessary” to “provide just punishment,” deter criminal behavior, and protect society from
28 “further crimes of the defendant.” In Mr. Feathers’s case, we respectfully submit that sentence

1 sits at the low end of the agreed-upon range. We have explained, as for the seriousness of the
2 offense, how the conduct underlying the plea agreement is a fraction of what is alleged in the
3 Indictment. The loss amount in the agreed-upon range is between \$250,000 and \$550,000, based
4 on a rough estimate of gain rather than investor loss. Mr. Feathers has agreed to take on whatever
5 restitution obligation is imposed on him in the civil case, though that is a far broader obligation
6 than the loss attributable to the conduct in the plea agreement. And there is no chance that the 54-
7 year old Mr. Feathers, whose record before this case was unblemished, will commit further
8 crimes now, regardless of how much additional time he may spend in prison.

9 **IV. PROBATION'S RESTITUTION RECOMMENDATION**

10 The Probation Office recommends that Mr. Feathers pay the \$22,000 in his saving account
11 – basically all that he has – toward restitution. PSR at 4 of Sentencing Recommendation. Mr.
12 Feathers respectfully asks the Court not to follow this recommendation.

13 The Court is aware that Mr. Feathers has taken on the obligation to pay whatever
14 restitution is determined by the Court in the civil enforcement action. In that case, the receiver
15 identified 365 investors with claims.³ A payment of \$22,000 divided among them provides each
16 person an additional sixty dollars (to be precise, \$60.27). On the flip-side, the loss of that
17 \$22,000 could have a devastating effect on Mr. Feathers's re-entry and his efforts to find new
18 employment to pay his restitution obligation. Sending Mr. Feathers back into society virtually
19 penniless would then actually work against the financial interests of those investors.

20 **V. SELF-SURRENDER REQUEST**

21 Mr. Feathers asks the Court to release him from detention and allow him one week to see
22 his children, tend to his aging parents, and otherwise organize his affairs before beginning his
23 prison term. He asks that he then be ordered to surrender to the United States Marshals Service
24 after that week to begin serving his sentence.

25 This request may be extraordinary, but the facts supporting its propriety at this time are
26 compelling. The Court revoked Mr. Feathers's bail after he had been free on pretrial release for

27 ³ Of the 459 investors the receiver identified, 94 made money from their investments in
28 the Funds and the other 365 recovered roughly 90% of their investment (PSR ¶ 13).

1 more than two years because of an email he sent to SEC personnel (from the related civil case)
2 and his own appointed attorneys early on the morning of March 7, 2017. The ill-considered email
3 put its recipients “on notice” of consequences “if the word Ponzi is used at trial, or the word
4 swindler, or similar.” Not immediately, but about 10 days later, the government moved to revoke
5 his bond. The Court held a hearing on March 23, after which it did indeed revoke the bond. The
6 Court, remarkably however, allowed Mr. Feathers to go home that day and self-surrender the next
7 day, something the Court would not have done had there been concern about the safety of
8 witnesses outside of the trial context.

9 The email should no longer be a basis to detain Mr. Feathers. Over six months ago, by
10 letter dated July 12, Mr. Feathers apologized to the email recipients for sending it. More
11 importantly, though, the email referred to future events that might happen “at trial.” Now that
12 Mr. Feathers has pleaded guilty and accepted responsibility, there will be no trial. The predicate
13 facts in the email will therefore not ever come to pass.

14 Mr. Feathers, who had in his life never been incarcerated, has now been in county jail in
15 Oakland for almost a year because of that one email. We ask that he now have the brief chance to
16 hug his boys and check on his mom and dad before going off to do his time.⁴

17 VI. RESTITUTION ORDER

18 For the following reasons, Mr. Feathers respectfully requests that rather than order a
19 specific amount of restitution, the Court instead simply adopt as its restitution order the amount of
20 restitution ultimately ordered in the civil enforcement proceeding. As recognized in the PSR, Mr.
21 Feathers “specifically agrees that restitution shall include the judgment now pending against him
22 in the case of Securities and Exchange Commission v. Small Business Capital, et al., CV 12-3237
23 EJD, Northern District of California” PSR ¶ 3. The plea agreement sets forth the same
24 obligation. Plea Agreement ¶ 10 (“I specifically agree that restitution shall include the judgment
25

26 ⁴ Allowing Mr. Feathers to self-surrender may affect the Public Safety Factors by which
27 the Bureau of Prisons scores him for designation. We think credit for self-surrender would lead
28 BOP to a more accurate security score assessment of Mr. Feathers. Mr. Feathers would of course
agree to any conditions of release, including electronic monitoring, were he permitted to self-
surrender.

1 now pending against me in the case of Securities and Exchange Commission v. Small Business
2 Capital, et al., CV 12-3237 EJD, Northern District of California, pursuant to 18 U.S.C. §
3 3663(a)(3) and 18 U.S.C. § 3663A(a)(3).”).

4 The Sentencing Recommendation in the PSR proposes that Mr. Feathers be ordered to pay
5 restitution in the amount of \$5,724,667.54. PSR, Sentencing Recommendation, at 4. That number
6 is derived from the court-appointed receiver’s most recent calculation of outstanding investor
7 losses. That amount, however, may yet change. For example, in one of the eight victim impact
8 statements in this case, an investor claims almost \$60,000 in losses while the receiver’s
9 calculation of that investor loss is a little less than \$25,000. Another investor claims a loss of
10 about \$156,000, which is different from what the receiver’s list shows (\$98,369). This suggests
11 that the receiver’s number may be in flux.

12 Because it appears that the actual restitution number in the civil case may not yet be set in
13 stone, Mr. Feathers asks that the Court adopt as its restitution order the amount of restitution
14 ultimately ordered in the civil case, rather than order a specific amount of restitution at this time.

15 Dated: February 23, 2018

Respectfully submitted,

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