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

13 UNITED STATES OF AMERICA) NO. CR 14-00531 LHK
14 Plaintiff,)
15 v.) UNITED STATES' SENTENCING
16 MARK FEATHERS,) MEMORANDUM
17 Defendant.) Date: March 7, 2018
Time: 9:15 a.m.

18
19 The United States of America, by and through its undersigned counsel, hereby submits its position
20 regarding the sentencing of the defendant, Mark Feathers. The government's position is based on its
21 investigation, the Presentence Report ("PSR"), the files and records of this case, and any arguments to be
22 presented at the sentencing hearing. For the reasons detailed below, the government recommends a
23 sentence of 33 months' imprisonment, three years of supervised release, restitution, and a \$100 special
24 assessment fee, which is sufficient, but not greater than necessary to meet the goals of sentencing
25 expressed in 18 U.S.C. § 3553(a).

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Offense Conduct**

3 In approximately 2004, Feathers formed Small Business Capital Corp. (“SBCC”) as a privately-
4 held, California corporation with its principal place of business in Los Altos, in the Northern District of
5 California. In addition to being the founder of SBCC, Feathers also served as its CEO and a director. In
6 2005, Feathers founded Investors Prime Fund, LLC (“IPF”) as an investment fund that would use proceeds
7 raised from investors in IPF to purchase loans secured by first deeds of trust on commercial and income-
8 producing residential real estate located primarily in California. In 2007, Feathers also formed SBC
9 Portfolio Fund (“SPF”) as an investment fund that would use investor proceeds to purchase loans secured
10 by first and second deeds of trust on commercial and income-producing residential real estate in California
11 and other states.

12 Between approximately 2009 and continuing through at least August 2010, and for some period
13 thereafter, no later than approximately June 2012, Feathers knowingly and intentionally participated in a
14 scheme to defraud investors in IPF and SBF. Specifically, he obtained money from investors under false
15 pretenses and arranged undisclosed, unapproved transfers of funds from IPF and SPF amounting to
16 unsecured loans in excess of \$5.5 million owed to IPF and SPF, to pay himself and SBCC.

17 Feathers transmitted several writings to investors omitting material facts about the nature of these
18 money transfers, and even requested retroactive approval of the transfers from IPF investors to conceal
19 his fraud. For example, on August 11, 2010, an SBCC’s newsletter was mailed to investors, including
20 victim JP. The newsletter represented, among other things, the status of IPF and SPF performance during
21 the prior month of July 2010 and the operations of the IPF investment portfolio. Feathers knew that this
22 newsletter contained material omissions about the underlying financial operations of IPF and SBCC,
23 including that, as of August 11, 2010, more than \$100,000 had been transferred as a receivable from IPF
24 to SBCC. Feathers made no mention of this discrepancy or his intent to contact IPF investors and request
25 their retroactive approval of these transfers in the newsletter.

26 On August 15, 2010, Feathers indeed sent a signed letter to IPF investors requesting their
27 retroactive approval of the IPF transfers, seeking to reclassify them as receivables due from SBCC. The
28 letter claimed that Feathers was seeking amendments to the IPF operating agreement for preferential tax

1 purposes, when in fact he was seeking post-hoc approval of the transfers under false pretenses to avoid
2 detection of his fraudulent conduct. After August 2010, Feathers failed to adequately disclose to investors
3 the material omissions from his August 15, 2010 letter.

4 **B. SEC Action and Receivership**

5 On June 21 2012, the Securities and Exchange Commission (SEC) filed a complaint against
6 Feathers SBCC, IPF, and SPF alleging several securities fraud violations spanning from 2009 through
7 2012. The SEC requested injunctions against all defendants, a temporary restraining order freezing the
8 defendants' assets and appointing a receiver, disgorgement of ill-gotten gains, and civil penalties against
9 Feathers. A temporary restraining order enjoining the defendants from violating securities laws was
10 granted by the Honorable Edward J. Davila on June 26, 2012, who also appointed Thomas A. Seaman as
11 the temporary receiver for SBCC, IPF, and SPF. Mr. Seaman was made the permanent receiver on July
12 10, 2012, when Judge Davila granted the SEC's requested preliminary injunction. As receiver, Seaman
13 filed a series of status reports detailing his progress in accounting for the companies' assets and preparing
14 to dispose of claims by defrauded investors.

15 On August 16, 2013, the Court granted summary judgment against Feathers. Shortly thereafter,
16 on November 6, 2013, the Court issued a permanent injunction against Feathers and his codefendants,
17 ordered disgorgement in the amount of \$7,782,961.07, representing profits gained as a result of the
18 conduct alleged in the SEC complaint along with prejudgment interest, and imposed a civil penalty of
19 \$10,000 on Feathers. On February 26, 2014, the Court granted the receiver's proposed Distribution Plan,
20 which articulated how the companies' assets would be distributed to qualifying claimants. Pursuant to
21 Distribution Plan, the "Rising Tide" method was used to allocate the receivership's assets, which
22 prioritized claimants that had recovered less than approximately 52% of their principal investments prior
23 to the receivership. Additional distributions were made after this initial group of claimants recovered up
24 to 52% of their principal. At the time the Plan was approved there were approximately \$40 million in
25 allowed claims from investors. The receiver has since distributed nearly \$35 million to investors in four
26 distributions, which ultimately allowed investors to recover at least 88% of their principal.¹ The
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¹ For additional information about the receivership visit: <http://www.sbcapitalreceiver.com/home.html>.

1 government's requested restitution of \$5,724,667.54 is the unpaid remainder of the claims against Feathers
2 and SBCC.

3 **C. Threats**

4 The civil case was very contentious. Feathers represented himself and filed several pleadings and
5 sent numerous communications accusing the SEC and the receiver of all manner of collusion, conspiracy
6 and bad faith. Many of these communications contained personal attacks; Feathers also threatened to sue
7 the receiver numerous times. *See, e.g.,* Declaration of Thomas A. Seaman in Support of Receiver's Motion
8 to Conclude Receivership, etc., 12-CV-03237 EJD (ECF No. 1164-1) (N.D. Ca. June 23, 2016). On March
9 7, 2017, while on pretrial release in the criminal matter, Feathers sent an email to potential witnesses in
10 the criminal action, including SEC attorneys and the receiver, threatening to "rise out of [his] seat and
11 attempt to bring injury to any party" who used the word "Ponzi" to describe Feathers' conduct. Feathers
12 was remanded to custody on March 23, 2017 and has remained in custody since his self-surrender on
13 March 24, 2017. Feathers later apologized for his email.

14 **D. Plea Agreement**

15 On December 20, 2017, Feathers pled guilty to one count of Mail Fraud, in violation of 18 U.S.C.
16 § 1341, admitting to the facts specified in Section A above. The agreement was made pursuant to Federal
17 Rule of Criminal Procedure 11(c)(1)(A) and (c)(1)(C), and the parties agreed to the following sentence:

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- 19 • Not less than 21 nor more than 33 months of imprisonment;
 - 20 • Three years of supervised release;
 - 21 • Restitution in an amount to be determined by the Court;
 - 22 • \$100 Special Assessment Fee.

23 The plea agreement also specified in Paragraph 10 that Feathers would pay restitution to victims,
24 including the judgment pending against him in *Securities Exchange Commission v. Small Business
Capital, et al.*, 12-CV-03237 EJD. Sentencing is scheduled for March 7, 2018.

25 **II. PRESENTENCE REPORT**

26 The government has reviewed the PSR and has no unresolved objections to the report's factual
27 recitation or Guidelines calculation. The government sent a clarification letter on February 21, 2018
28 explaining that the +12 enhancement under USSG § 2B1.1(b)(1)(G) was based on the gain to Feathers

1 and his company from the undisclosed, unapproved, transfers from IPF to SBCC for the period between
2 January 2009 and August 2010, when Feathers' request for retroactive approval of the transfers was sent
3 to IPF investors. As discussed in the Plea Agreement, Feathers' August 11, 2010 newsletter and August
4 15, 2010 letter to IPF investors concealed his true reasons for requesting their consent for the retroactive
5 revisions. These omissions form the factual basis for his plea and count of conviction.

6 **III. SENTENCING RECOMMENDATION**

7 The government believes that a sentence of 33 months' imprisonment, three years of supervised
8 release, restitution, and a \$100 special assessment fee meets the goals of sentencing expressed in 18 U.S.C.
9 § 3553(a). Among the many factors to consider are the nature and circumstances of the offense, the history
10 and characteristics of the defendant, and the need for the sentence imposed to reflect the seriousness of
11 the offense, promote respect for the law, provide just punishment, provide adequate deterrence to criminal
12 conduct, and to protect the public from further crimes of the defendant. *See* 18 U.S.C. §§ 3553(a)(1)-(2).
13 This recommendation is at the low-end of the defendant's applicable Guidelines range and takes into
14 account the defendant's low criminal history, pursuit of new career paths, and the expressed views of
15 many of the investors. The recommendation also includes a three-level downward departure pursuant to
16 USSG § 3E1.1 in recognition of Feathers' acceptance of responsibility and guilty plea.

17 The government requests that the court order restitution as directed in Paragraph 10 in the Plea
18 Agreement. Pursuant to 18 U.S.C. § 3663(a)(3) and 18 U.S.C. § 3663A(a)(3), Feathers agreed to adopt
19 the civil judgment imposed in the SEC action in 2013. This judgment covers all investors from the
20 inception of the fund in 2005 (four years before the timeframe of the Indictment) through the date of the
21 receivership in June 2012, including those who would likely not qualify as "criminal" victims of Feathers'
22 charged conduct.

23 Viewing the government's civil and criminal enforcement actions against Feathers in totality, the
24 government's requested sentence is both reasonable and fair. Through its civil action, the SEC was able
25 to secure permanent injunctions against Feathers, SBCC, IPF, and SPF, disgorgement of over \$7 million
26 in ill-gotten gains, a civil fine, and liquidation and distribution of all assets belonging to the offending
27 companies. The receiver has distributed nearly \$35 million to victim investors—allowing them recover
28 at least 88% of their principal investments. Many investors recovered 100% of their principal and some

1 even recovered amounts exceeding their investments. Feathers has agreed to pay the remaining
2 \$5,724,667.54 in criminal restitution. If the Court accepts the parties' agreement, he will also serve at
3 least 21 and up to 33 months in federal prison. This is an extremely successful outcome by any metric—
4 the offending companies were enjoined and shut down, the offending principal was fined, disgorged of
5 fraudulent gains, and will be sentenced to prison, and the victims have already recovered most, if not all,
6 of their losses.

7 **IV. CONCLUSION**

8 For the reasons set forth above, the government believes that a sentence of 33 months'
9 imprisonment, three years of supervised release, restitution, and a \$100 special assessment fee reflects the
10 seriousness of the defendant's criminal conduct and provides a significant deterrent to any future attempts
11 to violate the law. The government's recommended sentence is sufficient, but not greater than necessary,
12 to achieve the statutory purposes of sentencing, including deterrence and protection of the public from
13 further frauds committed by this defendant. The government agrees with Officer Casai's recommended
14 supervised release conditions, which impose reasonable restrictions on the defendant's activities to
15 encourage rehabilitation and respect for the law while deterring future criminal conduct and non-
16 compliance with supervised release.

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18 Respectfully submitted,

19 ALEX G. TSE
20 Acting United States Attorney

21 Dated: February 23, 2018

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23 /s/
24 MARISSA HARRIS
25 Assistant United States Attorney
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