

JS 44C/SDNY REV. 5/2010

JUDGE COTE CIVIL COVER SHEET 13 CV 1045

The JS 44C cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

FEB 14 2013

PLAINTIFFS United States of America, on behalf of Small Business Administration DEFENDANTS Elk Associates Funding Corp.

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Preet Bharara by AUSA Louis A. Pellegrino U.S. Attorney's Office, 86 Chambers Street, 3rd Floor New York, NY 10007 ATTORNEYS (IF KNOWN) Philip C. Feigen, Esq., Patton Boggs, LLP, 2550 M Street, NW Washington, D.C. 20037

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE) (DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Action by the Government to enforce the terms of a Consent Order for Receivership pursuant to 15 U.S.C. § 661 et seq.

Has this or a similar case been previously filed in SDNY at any time? No? [x] Yes? [ ] Judge Previously Assigned

If yes, was this case Vol. [ ] Invol. [ ] Dismissed. No [ ] Yes [ ] If yes, give date & Case No.

(PLACE AN [x] IN ONE BOX ONLY)

NATURE OF SUIT

ACTIONS UNDER STATUTES

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, IMMIGRATION, FORFEITURE/PENALTY, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, OTHER STATUTES. Includes checkboxes for various legal categories like AIRPLANE PRODUCT LIABILITY, PERSONAL INJURY, CONTRACT, LABOR, etc.

Check if demanded in complaint:

[ ] CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.? IF SO, STATE:

DEMAND \$ OTHER JUDGE DOCKET NUMBER

Check YES only if demanded in complaint JURY DEMAND: [ ] YES [x] NO

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(PLACE AN x IN ONE BOX ONLY)

**ORIGIN**

- 1 Original Proceeding    
  2a. Removed from State Court    
  3 Remanded from Appellate Court    
  4 Reinstated or Reopened    
  5 Transferred from (Specify District)    
  6 Multidistrict Litigation    
  7 Appeal to District Judge from Magistrate Judge Judgment  
 2b. Removed from State Court AND at least one party is pro se.

(PLACE AN x IN ONE BOX ONLY)

**BASIS OF JURISDICTION**

**IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1322, 1441)**

- 1 U.S. PLAINTIFF    
  2 U.S. DEFENDANT    
  3 FEDERAL QUESTION (U.S. NOT A PARTY)    
  4 DIVERSITY

**CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)**

(Place an [X] in one box for Plaintiff and one box for Defendant)

	PTF	DEF		PTF	DEF		PTF	DEF
CITIZEN OF THIS STATE	[ ]	[ ]	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	[ ]	[ ]	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	[ ]	[ ]
CITIZEN OF ANOTHER STATE	[ ]	[ ]	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[ ]	[ ]	FOREIGN NATION	[ ]	[ ]

**PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)**

United States of America  
 86 Chambers Street, Third Floor  
 New York, NY 10007  
 New York County

**DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)**

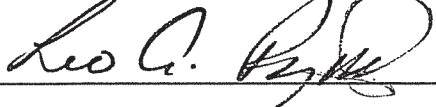
Elk Associates Funding Corporation  
 747 Third Avenue, 4th Floor  
 New York, NY 10017  
 New York County

**DEFENDANT(S) ADDRESS UNKNOWN**

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Check one: THIS ACTION SHOULD BE ASSIGNED TO:  WHITE PLAINS  MANHATTAN  
 (DO NOT check either box if this a PRISONER PETITION.)

DATE 2/14/2013 SIGNATURE OF ATTORNEY OF RECORD



ADMITTED TO PRACTICE IN THIS DISTRICT

NO    
  YES (DATE ADMITTED Mo. Nov. Yr. 2005)  
 Attorney Bar Code #LP2270

RECEIPT #

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge \_\_\_\_\_

**MAG JUDGE DECK**  
 is so Designated.

Ruby J. Krajick, Clerk of Court by \_\_\_\_\_ Deputy Clerk, DATED \_\_\_\_\_

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)

JUDGE COTE

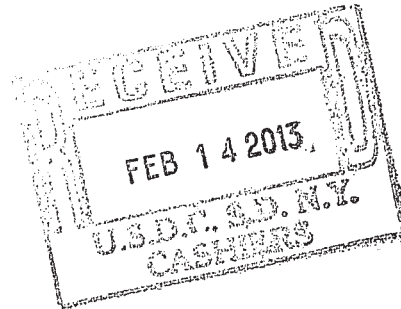
13 CV 1045

COPY

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Southern District of New York  
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA, )  
on behalf of its agency, the United )  
States Small Business Administration, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ELK ASSOCIATES FUNDING CORP., )  
 )  
Defendant. )  
 )



12 Civ. \_\_\_\_\_

**COMPLAINT FOR RECEIVERSHIP AND INJUNCTION**

Plaintiff, the United States of America, on behalf of its agency, the United States Small Business Administration, by its attorney Preet Bharara, United States Attorney for the Southern District of New York, alleges upon information and belief as follows:

**PRELIMINARY STATEMENT**

1. This is a civil action brought by the United States on behalf of the Small Business Administration (hereinafter, "SBA," "Agency" or "Plaintiff"), to enforce the terms of a settlement agreement, including entry of a Consent Order of Receivership.

**PARTIES**

2. Plaintiff SBA's central office is located at 409 Third Street, S.W., Washington, DC 20416.

3. Defendant, Elk Associates Funding Corporation (hereinafter "Elk" or "Licensee"), maintains its principal place of business at 747 Third Avenue, 4<sup>th</sup> Floor, New York, NY 10017.

4. Elk's sole shareholder is AmeriTrans Capital Corporation.

**JURISDICTION AND VENUE**

5. Jurisdiction is conferred on this Court by virtue of the Small Business Investment Act of 1958, as amended (hereinafter, the "Act"), Sections 308(d), 311, and 316; 15 U.S.C. §§687(d), 687c, 687h; the Small Business Act, 15 U.S.C. §634(b)(1); and 28 U.S.C. §1345.

6. Venue is proper under 15 U.S.C. §§ 687(d), 687h and 28 U.S.C. §1391(b).

**STATUTORY FRAMEWORK AND FACTUAL BACKGROUND**

7. On or about July 24, 1980, Elk was licensed by SBA as a Small Business Investment Company ("SBIC") pursuant to Section 301(c) of the Act, 15 U.S.C. §681(c) as SBA License 02/02-5377, solely to do business under the provisions of the Act and the Regulations.

8. Section 308(c) of the Act, 15 U.S.C. §687(c), empowers SBA to prescribe regulations to carry out the provisions of the Act and to govern the operations of SBICs. SBA has duly promulgated such regulations, which are codified at Title 13 of the Code of Federal Regulations, Part 107 (the "Regulations").

9. Section 303 of the Act, 15 U.S.C. §683, authorizes SBA to provide financing to licensed SBICs. Pursuant to Section 303 of the Act, 15 U.S.C. §683, SBA provided funds to Elk through the purchase and/or guaranty of debentures, a form of leverage, as those terms are defined under the Regulations.

10. Currently, there remains \$21,075,000 in outstanding debenture leverage.

11. The debentures described in paragraphs 9-10, above, are expressly subject to and incorporated by reference in the Regulations, including but not limited to 13 C.F.R. §§107.1810, 1830-1850 and §107.507.

12. Section 308(d) of the Act, 15 U.S.C. §687(d), provides that upon determination and adjudication of noncompliance or violation of the Act or the regulations, all of the rights, privileges and franchises of a licensee, such as Elk, may be forfeited and the company may be declared dissolved.

13. Section 311 of the Act, 15 U.S.C. §687c, provides that upon a determination by SBA that a licensee, such as Elk, has engaged in or is about to engage in any acts or practices which constitute or will constitute a violation of the Act or of any rule or regulation promulgated pursuant to the Act, or of any order issued under the Act, then SBA may make application for an injunction, and such Court shall have jurisdiction of such action and grant a permanent or temporary injunction, or other relief without bond, upon a showing that such licensee has engaged in or is about to engage in any such acts or practices. The Court is authorized to appoint SBA to act as receiver for such licensee.

14. On or about March 20, 2012, Elk filed a complaint and motion for preliminary injunction and temporary restraining order in the United States District Court

for the District of Columbia against the U.S. Small Business Administration styled Elk Associates Funding Corporation v. U.S. Small Business Administration et. al, Case No. 12-cv-00438 (“the Action”).

15. On or about October 31, 2012, Elk and SBA entered into a Settlement Agreement (“the Agreement”) and filed a Joint Stipulation of Dismissal of the Action.

16. As partial consideration for the Settlement Agreement, Elk agreed that on or before the 45<sup>th</sup> day after execution of the Agreement, Elk would tender \$7,900,000 via wire transfer in one lump sum in full satisfaction of Elk’s outstanding debenture leverage.

17. Via written agreement executed on or about December 7, 2012, SBA and Elk agreed to extend the date for payment of the \$7,900,000 referenced in paragraph 15, above, through January 7, 2013.

18. As partial consideration for the Agreement, Elk agreed to execute a Consent Order of Receivership to be filed by SBA only in the event Elk failed to make its \$7,900,000 payment as required under the Agreement.

19. To date, Elk has failed to make its payment as agreed.

20. To date, Elk has failed to honor the terms of the Agreement.

### **COUNT ONE**

#### **BREACH OF CONTRACT**

21. Paragraphs 1 through 20 are incorporated herein by reference.

22. Elk’s failure to make payment as agreed and failure to honor the terms of the Agreement has injured SBA in the amount of at least \$7,900,000.



23. Elk's failure to honor the terms of the Agreement is a violation of 13 C.F.R. 107.507 (a), *Nonperformance*, as Elk failed to perform under a written agreement with SBA.

23. As a consequence of Elk's failure to make its payment and honor its agreement, SBA is entitled to entry of the Consent Order of Receivership executed by Elk.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays as follows:

A. That this Court enter the Consent Order of Receivership and grant injunctive relief, both preliminary and permanent in nature, restraining and enjoining Elk, its past or present general partner(s), managers, management company, directors, officers, agents, employees, and other persons acting in concert therewith from: (1) making any disbursements of Elk's funds; (2) using, investing, conveying, disposing, executing or encumbering in any fashion any funds or assets of Elk's, wherever located; and (3) further violating the Act or the regulations promulgated thereunder.

B. That this Court determine and adjudicate Elk's noncompliance with and violation of the Act and the Regulations promulgated thereunder.

C. That this Court, pursuant to 15 U.S.C. §687c, take exclusive jurisdiction of Elk and all of its assets, wherever located, appoint SBA as receiver of Elk for the purpose of marshaling and liquidating the assets of Elk and satisfying the claims of creditors as approved by this Court, and such other relief as contained in the Consent Order filed herewith.

D. That this Court enter judgment in the amount of \$20,806,071.32 (as of

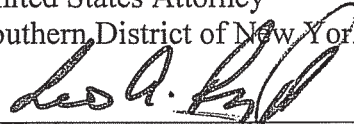
February 4, 2013), consisting of principal in the amount of \$20,780,332.33 in principal plus \$25,738.99 in interest through February 4, 2013, until the date of judgment, together with post judgment interest pursuant to 28 U.S.C. § 1961 as of the date judgment is entered.

E. That this Court grant such other relief as may be deemed just and proper.

Dated: New York, New York  
February 14, 2013

Respectfully submitted,

PREET BHARARA  
United States Attorney  
Southern District of New York



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