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7 THOMAS A. SEAMAN

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

11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 vs.

14 SMALL BUSINESS CAPITAL CORP.;
15 MARK FEATHERS; INVESTORS
PRIME FUND, LLC; AND SBC
16 PORTFOLIOS, LLC,

17 Defendants.

Case No. CV12-03237-EJD

NOTICE OF MOTION AND MOTION
OF RECEIVER FOR APPROVAL OF
SALE OF 7(a) LOAN PORTFOLIO,
SERVICING RIGHTS AND SBLC
LICENSE; MEMORANDUM OF
POINTS AND AUTHORITIES; AND
[PROPOSED] ORDER

Date: April 14, 2016
Time: 9:00 am
Ct rm: 4 - 5th Floor
Judge: Hon. Edward J. Davila

19 **PLEASE TAKE NOTICE** that on April 14, 2016, at 8:30 a.m. in
20 Courtroom 4, 5th Floor, of the United States District Court, 280 South 1st Street,
21 San Jose, California, 95113, the Court will consider the motion (the "Motion"), of
22 Thomas A. Seaman ("Receiver"), Court-appointed Receiver for Small Business
23 Capital Corp. ("SBCC"), Investors Prime Fund, LLC ("IPF"), SBC Portfolio
24 Fund, LLC ("SPF") and their subsidiaries and affiliates, including Small Business
25 Capital, LLC ("SBC LLC") and SBC Senior Commercial Mortgage Fund, LLC
26 ("SCMF"), for approval of the sale of the Small Business Administration ("SBA")
27 7(a) loan portfolio, the servicing rights associated with 7(a) loans, and the SBA
28 Small Business Lending Company license to BYL Small Business Finance, LLC, a

1 California limited liability company pursuant to the Loan Purchase and Sale
2 Agreement, attached as Exhibit B to the Declaration of Thomas A. Seaman in
3 Support of Motion for Approval of Sale of 7(a) Loan Portfolio, Servicing Rights and
4 SBLC License, ("Seaman Declaration"), filed currently herewith. As part of the
5 relief sought in the Motion, the Receiver also requests the Court to waive the
6 requirements of 28 U.S.C. § 2004.

7 The Motion is posted on the Receiver's website (www.sbcapitalreceiver.com).
8 A hard copy can also be obtained by emailing a request to the Receiver through the
9 website or by sending a written request to the Receiver at 3 Park Plaza, Suite 550,
10 Irvine, California 92614.

11 If you wish to oppose the Motion, you are required to file your written
12 opposition with the Office of the Clerk, United States District Court, 280 South
13 1st Street, San Jose, California, 95113, and serve the same on the undersigned not
14 later than fourteen (14) days after the Motion was filed.

15
16 Dated: January 27, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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18 By: /s/ David R. Zaro

19 DAVID R. ZARO
20 Attorneys for Receiver
21 THOMAS A. SEAMAN
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The Receiver seeks authority to sell the following assets of the receivership
3 estate to BYL Small Business Finance, LLC, a California limited liability company
4 (the "Buyer"):

- 5 • Interests in a loan portfolio consisting of Small Business
6 Administration ("SBA") 7(a) Loans, which loans and interests are
7 identified on that chart attached to the Seaman Declaration as Exhibit A
8 ("7(a) Loans");
- 9 • The rights to service the 7(a) Loans and receive servicing fees in
10 connection therewith ("Servicing Rights"); and
- 11 • The SBA Small Business Lending Company license governed by the
12 SBA regulations (the "License").¹

13 This Motion seeks approval of the sale of the Assets to the Buyer in
14 accordance with procedures set forth in that Motion for (A) Approval of Sales
15 Procedures for Loan Portfolio and (B) Authority to Engage Voit, as Real Estate
16 Broker ("Sale Procedures Motion") [Docket No. 762]; the May 9, 2014, Order
17 Granting Approval of Sale Procedures for Loan Portfolios and 7(a) License and
18 Authorizing Engagement of Voit Real Estate Services LP as Broker [Docket
19 No. 898] ("Sale Procedures Order"); and the Loan Purchase and Sale Agreement
20 attached as Exhibit B to the Seaman Declaration, filed herewith. As the Court is
21 aware these Assets were previously the subject of a sale to BusinessUS LLC, a
22 Delaware limited liability company ("BusinessUS"), however, BusinessUS breached
23 its agreement to purchase the Assets after this Court approved the sale. As a result
24 of their breach, the Receiver was required to restart the sale process, locate another
25 buyer for the Assets and obtain SBA approval.

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28 ¹ The 7(a) Loans, Servicing Rights and License are sometimes collectively referred to herein as the "Assets."

1 As detailed below and in the Seaman Declaration, the Receiver marketed the
 2 Assets per the terms of the Sale Procedures Motion and Sale Procedures Order. The
 3 proposed sale of the Assets will return an aggregate of approximately 90% of the
 4 principal value of the 7(a) Loans, plus \$1,200,000 for the Servicing Rights and
 5 License. This will provide approximately \$4,966,000, (less attorneys' fees,
 6 administrative and sales costs), for the receivership estate.² The Buyer has made the
 7 required deposits and executed the Loan Purchase and Sale Agreement. The SBA
 8 has consented to the sale to the Buyer pursuant to that letter dated December 24,
 9 2015, attached to the Seaman Declaration as Exhibit C.

10 Accordingly, the Receiver requests the Court to grant the Motion, waive the
 11 requirements of 28 U.S.C. § 2004, and confirm the sale of the Assets to the Buyer.

12 I. SUMMARY OF SALES PROCESS AND SALE

13 The Receiver and Voit Real Estate Services LP ("Voit ") have marketed and
 14 conducted the sale of the Assets in accordance with the process set forth in the Sale
 15 Procedures Order. Seaman Declaration, ¶ 4-8. This marketing and sales process
 16 included the following actions:

- 17 • The Receiver, with the assistance of Voit, prepared a virtual sale
 18 platform, which included imaged and indexed loans, servicing
 19 documentation and data, and legal documents.
- 20 • The Receiver and Voit marketed the Assets for well over 45 days.
 21 The original marketing effort included announcing the opportunity to
 22 approximately 4,000 potential purchasers, advertising the opportunity
 23 on three occasions in the Wall Street Journal, and giving interested
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 27 ² These purchase prices of the 7(a) Loans will vary slightly based on the
 28 commission paid to Voit, final calculation of the payments received for the 7(a)
 Loans in advance of closing of the sale, (which sale is expected to occur within 5
 days of an entry of an order by the Court), and costs of administration of the
 receivership estate.

1 parties who signed a confidentiality agreement, access to an online due
2 diligence platform.

- 3 • After the BusinessUS sale did not close, the Receiver returned to those
4 parties who had previously expressed interest and worked with the
5 SBA to identify and vet potentially qualified bidders.
- 6 • The Receiver provided such prospective purchasers with instructions
7 for submitting an application to qualify to bid on the 7(a) Loans,
8 Servicing Rights, and the License. Those prospective purchasers who
9 wished to bid on the Assets signed and returned to the Receiver the
10 confidentiality agreement, together with a \$500 payment.
- 11 • Prospective purchasers of the 7(a) Loans, Servicing Rights, and
12 License were provided with information on the transfer and
13 assumption requirements of the SBA.
- 14 • The Receiver and Voit worked with the prospective purchasers who
15 continued to express interest in pursuing the purchase of the Assets.
16 All interested prospective purchasers were required to demonstrate the
17 financial ability to close. Those prospective purchasers deemed
18 capable of closing and otherwise suitable candidates were given access
19 to the complete loan files and confidential information contained in
20 the secure database.
- 21 • Those still seeking to purchase the Assets were asked to present to the
22 SBA and Receiver the materials outlined in the Sale Procedures
23 Motion in order to be pre-qualified by the SBA. The Receiver
24 reviewed the packages from each bidder and transmitted the complete
25 packages to the SBA.
- 26 • The Receiver solicited bids from each qualified bidder, and invited
27 each bidder to submit a best and final bid to the Receiver. In addition,
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1 the Receiver worked extensively with the bidders and the SBA to
2 address the qualification issues with regard to each bid.

- 3 • In consultation with the SBA, the Receiver selected the most
4 acceptable offer and notified the winning bidder, in this case, the
5 Buyer. On December 24, 2015, the SBA confirmed to the Receiver
6 that it approves of the proposed sale to the Buyer. (Seaman
7 Declaration, Exhibit C)
- 8 • Buyer and the Receiver have signed the Loan Purchase and Sale
9 Agreement. As reflected in Exhibit A to the Loan Purchase and Sale
10 Agreement. Therefore, the Receivership Entities will receive
11 approximately 90% of the principal due on the 7(a) loans or
12 \$4,966,000. In addition, the Buyer is paying \$1,200,000 for the
13 Servicing Rights and License.
- 14 • The Receiver anticipates closing the sale within five business days of
15 entry of the order confirming the sale. Deposits for losing bids will be
16 returned.

17 Seaman Declaration ¶ 4-13.

18 The sale price reflects the highest price from an SBA approved purchaser
19 achieved through the sale process approved by the Court. It should be noted that the
20 sale price was adversely impacted by the requirement that potential purchasers were
21 required to qualify with the SBA as a licensed Small Business Lending Company.
22 The pool of potential buyers and the value of the 7(a) Loans was likely also
23 impacted by the SBA's claims in the receivership case and the very fact of the
24 receivership itself. Based upon the facts and circumstances of this case, the
25 Receiver believes that the approved sales and marketing procedure has generated a
26 reasonable return to the receivership estate with regard to the sale of the Assets.

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II. ARGUMENT

A. Broad Equitable Powers of the Court

"The power of a district court to impose a receivership or grant other forms of ancillary relief does not in the first instance depend on a statutory grant of power from the securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). As the appointment of a receiver is authorized by the broad equitable powers of the Court, any distribution of assets must also be done equitably and fairly. *See S.E.C. v. Elliot*, 953 F.2d 1560, 1569 (11th Cir. 1992).

District courts have the broad power of a court of equity to determine the appropriate action in the administration and supervision of an equity receivership. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). As the Ninth Circuit explained:

A district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership. The basis for this broad deference to the district court's supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions. A district court's decision concerning the supervision of an equitable receivership is reviewed for abuse of discretion.

Id. (citations omitted); *see also Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role, and 'we generally uphold reasonable procedures instituted by the district court that serve th[e] purpose' of orderly and efficient administration of the receivership for the benefit of creditors.").

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1 Accordingly, the Court has broad equitable powers and discretion in the
2 administration of the receivership estate and disposition of receivership assets.

3 **B. The Proposed Asset Sale is Fair and Reasonable**

4 As reflected above, and per the evidence submitted in support of the Sale
5 Procedures Motion, the sale process adopted by the Receiver was proposed in an
6 effort to generate the highest possible return for the investors and creditors in the
7 receivership estate. (See Request For Judicial Notice filed concurrently herewith.)
8 The multi-stage process of marketing, obtaining indicative bids and then seeking
9 further bids provided an opportunity for the Receiver to negotiate and obtain the
10 best possible price for the Assets. Accordingly, the Receiver believes the sale
11 process achieved the goal of obtaining the highest price for the Assets that could be
12 achieved under these facts and circumstances.

13 In light of the nature of the Assets and the necessary involvement and
14 regulatory requirements of the SBA in connection with the sale, the Court
15 previously agreed to permit the sale of the Assets to proceed in accordance with the
16 foregoing described procedures and waive the specific procedural requirements set
17 forth in 28 U.S.C. § 2004. [See Docket No. 898.] The Receiver's proposed
18 procedure allowed him to entertain competitive offers of qualified purchasers of the
19 loan portfolios, seek SBA approval and then present the proposed Buyer to the
20 Court for confirmation. The results of the sale process were fair and appear to
21 validate the approach. Through this process, the Receiver believes the receivership
22 estate is recovering an amount reflecting the present value of these Assets based
23 upon all of the facts and circumstances in this case.

24 **C. Payment to Voit**

25 The Court previously authorized the Receiver to retain Voit to market and sell
26 the 7(a) Loans. The commission rate approved by the Court was 1%.

27 The Receiver respectfully requests that the Court approved payment of Voit's
28 commission of 1% in accordance with the Sale Order.

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III. CONCLUSION

Wherefore the Receiver requests that the Court grant the Motion and authorize the Receiver to sell the Assets to the Buyer pursuant to the Loan Purchase and Sale Agreement and to waive the requirements set forth in 28 U.S.C. § 2004 for publication, appraisal, and public auction.

Dated: January 27, 2016

ALLEN MATKINS LECK GAMBLE
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By: /s/ David R. Zaro
DAVID R. ZARO
Attorneys for Receiver
THOMAS A. SEAMAN