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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 PORTFOLIO FUND, LLC,

17 Defendants.

Case No. CV12-03237

RECEIVER'S EX PARTE
APPLICATION TO AMEND THE
RELIEF SOUGHT IN RECEIVER'S
MOTION TO CONCLUDE
RECEIVERSHIP AND FEE
APPLICATIONS OF THE RECEIVER
AND ALLEN MATKINS [DKT. NOS.
1164, 1165, 1166]; AND TO RE-SET
VACATED HEARING DATE FOR
FEBRUARY 16, 2017 [DKT. NO. 1224]

[Proposed Order Submitted Concurrently
Herewith]

Ctrm.: 4 - 5th Floor
Judge: Hon. Edward J. Davila

1 Thomas A. Seaman ("Receiver"), Court-appointed permanent receiver for
 2 Small Business Capital Corp. ("SBCC"), Investors Prime Fund, LLC ("IPF"), SBC
 3 Portfolio Fund, LLC ("SPF") and their subsidiaries and affiliates, including Small
 4 Business Capital, LLC ("SBC LLC") and SBC Senior Commercial Mortgage
 5 Fund, LLC ("SCMF") (collectively, "Receivership Entities"), hereby applies ex
 6 parte to amend the relief sought in the Receiver's pending Motion To Conclude The
 7 Receivership And Orders To: (1) Approve The Sale Of The Cline Judgment And
 8 California Business Bank Stock; (2) Authorize Receiver To Establish A Reserve
 9 And Make Administrative Payments And Final Distributions To Claimants:
 10 (3) Approve Stipulation Related To Claim Of The U.S. Small Business
 11 Administration And Address Other Post-Receivership Claims; (4) Approve Final
 12 Accounting And Report; (5) Approve Destruction Or Transfer Of Books And
 13 Records; (6) Approve Release Of Feathers Reserve Funds; and (7) Discharge The
 14 Receiver (Dkt. No. 1164) ("Closing Motion"), the Receiver's Fee Application; and
 15 the Fee Application of Allen Matkins (Dkt. Nos. 1165, 1166) (collectively, "Fee
 16 Applications".) By this Application, the Receiver seeks to reserve funds to address
 17 Mr. Feather's request for the attorneys' fees; modify the timing of document
 18 destruction; increase to Receiver's reserve for the Receiver's and professionals' fees;
 19 and re-set the hearing on the Closing Motion and Fee Applications for February 16,
 20 2017.

21 This application was discussed with the Securities and Exchange Commission
 22 (the "Commission") and they have indicated that they do not oppose.

23 I. INTRODUCTION

24 By this application, the Receiver seeks the following relief in connection with
 25 the pending Closing Motion:

- 26 • The \$200,000 ("Fee Reserve") reserved by the Receiver to potentially
 27 pay Mr. Feather's legal fees will continue to be held by the Receiver
 28 subject to the following conditions: If Mr. Feather does not prevail on

1 his motion to obtain the Fee Reserve, then the Receiver will distribute
 2 the Fee Reserve to investors and non-investor claimants at the time of
 3 the Receiver's final distribution.¹ Otherwise, the Fee Reserve will be
 4 disbursed in accordance with this Court's orders.

- 5 • The Receiver will retain the Receivership Entities' documents and
 6 records in his possession pending the outcome of the Appeals. If no
 7 appellate matters are remanded to the District Court when the Appeals
 8 are decided, then Mr. Feathers and the United States Attorney will have
 9 60 days to take physical possession of the documents (except investor
 10 records) at no cost to the receivership. The Receiver will destroy the
 11 balance of documents in his possession after the 60 day period ends.
- 12 • The Reserve set aside to pay the fees of the Receiver and professionals
 13 shall be modified as follows to reflect the additional fees and costs
 14 associated with this matter:

	<u>Original</u>	<u>Proposed Reserve</u>
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|---|----------|-----------|
| <ul style="list-style-type: none"> 15 • Receivers Fees: \$45,000 16 • Allen Matkins: \$75,000 | \$45,000 | \$60,000 |
| | \$75,000 | \$100,000 |

- 17 • In addition to the foregoing relief, the Receiver respectfully request that
 18 the hearing on the Closing Motion and Fee Applications which was
 19 vacated by the Court per the Order Re: Motion to Defer Ruling on
 20 November 14, 2016 [Dkt. No. 1224], will be re-set for February 16,
 21 2016. At that time, the Receiver also requests the Court to consider the
 22 foregoing described modifications to the Closing Motion.
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 24
 25
 26

27 ¹ If Judge Koh denies Mr. Feathers' motion to obtain the Fee Reserve in advance
 28 of the hearing on the Closing Motion or entry of an order thereon, the Receiver
 proposes to distribute the funds as set forth in the Closing Motion.

1 **II. GOOD CAUSE EXISTS FOR THE RELIEF SOUGHT HEREIN**

2 As the Court is aware, the Receiver completed most of his receivership work
3 in June 2016, save the few tasks outlined in the Closing Motion. Good cause exists
4 for this Court to promptly grant the Closing Motion as modified herein in its entirety
5 for the following reasons:

- 6 • The Receiver's proposed modifications to the relief sought in the
7 Closing Motion address Mr. Feathers' principal objections to the
8 Closing Motion;
- 9 • Mr. Feathers has indicated that he will appeal whatever order is entered
10 by this Court (as evidenced by Mr. Feathers' pending appeals from this
11 Court's orders.) The only way to achieve finality in this receivership
12 case is to obtain the entire relief requested in the Closing Motion
13 including discharging the Receiver and paying the Receiver's and his
14 professional's fees so that Mr. Feathers can appeal the order prior to the
15 final distribution of receivership funds.²
- 16 • 375 investors have been waiting for over four years for their final
17 distributions. These investors have been conveying their hardship
18 requests, frustration, and unhappiness on an almost daily basis to the
19 Receiver and his professionals. As such, the Receiver believes that
20 equity and fairness calls for the Court to address these very real needs
21 and concerns as soon as practicable.
- 22 • The Receiver still has two assets that must be sold. It is entirely
23 unclear how long the proposed buyer will wait and the impact of delays
24 on the values of the assets.

25
26
27 ² As a practical matter, the Receiver cannot make final distributions to investors,
28 creditors and professionals while the appeals are pending because there is no way
to know how much to distribute. As such, the Receiver believes it is critical to
obtain these orders now so that appeals can be Mr. Feathers' final prosecution.

- 1 • While the Receiver has attempted to limit the fees and costs associated
2 with the receivership, both the Receiver and his counsel receive calls
3 from investors as well as other parties interested in the case such as
4 Business U.S. and the proposed purchaser of the remaining receivership
5 assets. While individual inquiries result in only nominal expenses, over
6 the many months since the Closing Motion was filed, the cost of these
7 communications is accumulating.

8 The proposed changes to the relief requested in the Closing Motion are
9 designed to address claims by Mr. Feathers that have caused further delays in the
10 receivership proceedings. Specifically, the proposed change addresses Mr. Feathers'
11 Motion for Release of Funds ("Criminal Fee Motion") pending in the criminal action
12 filed by the United States against Mr. Feathers. See, United States v. Mark
13 Feathers, Case No. 5:14-00531-LHK-1, [Dkt. 60,66]. Pursuant to the Criminal Fee
14 Motion, Mr. Feathers seeks access to the \$200,000 set aside by the Receiver in
15 accordance with this Court's Orders. The Receiver, the SEC and the AUSA contend
16 that Mr. Feathers has no right to these funds because the condition for release of the
17 reserve was not met. The Receiver understands that this Court may be waiting for
18 Judge Ko's ruling on the Criminal Fee Motion before deciding the Closing Motion.

19 In light of this and in the interest of expediting closure of this receivership,
20 the Receiver is proposing to hold the Fee Reserve pending the outcome of
21 Mr. Feathers' Criminal Fee Motion. If Mr. Feathers does not prevail, then the
22 Receiver will distribute the Fee Reserve to investors following the conclusion of all
23 appeals.

24 At the request of the Securities and Exchange Commission, the Receiver is
25 also proposing to slightly alter the Receiver's approach to document destruction so
26 that the documents are retained until the Appeals have been concluded. If no
27 matters have been remanded to this Court, then the Mr. Feathers and the United
28 States Attorney shall have 60 days to take possession and control of the documents

1 at no cost to the receivership. If they do not take possession of the documents, then
2 the Receiver will destroy the documents.

3 Finally, as a result of delays in closing the case and work associated with
4 Mr. Feathers' Criminal Fee Motion, both the Receiver and his professionals have
5 incurred additional fees and costs. As such the Receiver is proposing to increase the
6 reserve as reflected hereinabove.

7 **III. CAUSE FOR RE-SETTING THE HEARING**
8 **AND SHORTENING TIME**

9 There is presently a hearing set for February 16, 2017 as to a number of
10 motions filed by Mr. Feathers [Dkt. 1208]. The Receiver asks the Court to re-set the
11 continued hearing on the Closing Motion to February 16, 2017.

12 Further delays in closing this case are anticipated as a result of Mr. Feathers'
13 six (6) appeals of this Court's orders. Mr. Feathers has indicated that he intends to
14 appeal the order entered by this Court regarding the Closing Motion.

15 Given these facts, it is important for this Court to act as soon as possible in
16 order to start the clock running as to the appeals. Waiting for some indeterminate
17 time for the Criminal Fee Motion to be adjudicated will cause undue delay in the
18 closing of the case and hardship on the investors. The relief proposed herein
19 addresses those issues.

20 Assuming this Court enters an order granting the relief requested in the
21 Closing Motion and Fee Applications, the Receiver will then notify the Ninth
22 Circuit Court of Appeals to promptly consider and address the 6 outstanding appeals
23 based on the following:

- 24
- 25 • This order reflects the final order anticipated in the receivership case;
 - 26 • Except for any appeal from this order, the Receiver believes there can
27 be no further appeals filed by Mr. Feathers; and
- 28

- A decision filed by the Ninth Circuit Court of Appeals as to all of the 6 appeals is required to close the receivership case and end the investors' ongoing hardship.

There are real and significant ongoing costs associated with maintaining the receivership for an in-determinant time while appeals are pending as well as Mr. Feathers' criminal proceeding. Making a distribution will eliminate many of the calls and emails that must be addressed on a daily basis. Completing the asset sales will eliminate the cost of managing those assets and allow the Receiver to realize the highest value. Overall, the sooner the case can be closed, the sooner the Receiver will stop incurring the ongoing cost of working with investors, addressing Mr. Feathers' concerns, storing documents and records, and otherwise managing the receivership.

The requested order re-setting the hearing and shortening time will not prejudice any interested parties. All parties have already had an opportunity to argue and otherwise make their views known to the Court. For these reasons the Receiver respectfully requests an order setting a hearing for February 16, 2017.

IV. CONCLUSION

Based upon the foregoing, there is good cause for the relief requested herein and for the Court to re-set this matter for hearing on February 16, 2017.

Dated: December 16, 2016

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: /s/ David R. Zaro

David R. Zaro
Attorneys for Receiver
THOMAS A. SEAMAN