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8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 vs.

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

17 Defendants.

Case No. CV12-03237

**RECEIVER'S EX PARTE APPLICATION
 FOR AUTHORITY TO COMPLETE
 POOLING TRANSACTIONS FOR TWO
 EXISTING LOANS**

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

1 Thomas A. Seaman ("Receiver"), the Court-appointed permanent receiver for Small
2 Business Capital Corp. ("SB Capital"), Investors Prime Fund, LLC ("IPF"), SBC Portfolio
3 Fund, LLC ("SPF"), and their subsidiaries and affiliates (collectively, the "Receivership Entities"),
4 hereby applies for an order authorizing him to proceed with certain loan transactions and execute,
5 solely in his capacity as federal equity receiver, certain agreements with the Small Business
6 Administration ("SBA") necessary to pool two loans that were funded prior to the Receiver's
7 appointment.

8 I. INTRODUCTION

9 The Receivership Entities participated in several SBA loan programs governed by
10 HB 5297, The Small Business Jobs Act. One program, known as the 504 loan program, provides
11 SBA-guaranteed debenture funding secured by junior mortgages on properties securing senior
12 loans funded by the Receivership Entities. After the Receivership Entities fund a first mortgage
13 loan, a private entity called a Certified Development Company ("CDC") issues an
14 SBA-guaranteed debenture secured by a second mortgage. Under the First Mortgage Lien Pooling
15 program ("FMLP"), a short-term feature of the 504 loan program added under HB 5297, the loan
16 is then placed into a pool and 85% of the loan is sold to private investors with a guaranty from the
17 SBA. The Receivership Entities hold the remaining 15% interests and receive "excess servicing
18 fees." As explained below, the "excess servicing fees" increase the yield on the loans to the
19 Receivership Entities. Declaration of Thomas Seaman filed herewith ("Seaman Declaration"), ¶ 2.

20 Two loans were funded in the 60-90 days prior to the appointment of the Receiver with the
21 intention that they would be included in the 504 program. The SBA-guaranteed debentures have
22 been issued for these loans, but the loans have not yet been pooled. The Receiver now seeks
23 authority to execute whatever documents are required to conclude the pooling transactions,
24 including, if necessary, SBA agreements. The Receiver recommends proceeding with these
25 transactions because the Receivership Entities will receive approximately \$4.216 million from the
26 transactions (85% of the principal loan balances), retain the other 15% of the loans, and receive
27 monthly "excess servicing fees." Seaman Declaration, ¶ 3.

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II. CAUSE FOR EX PARTE RELIEF

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2 The Receiver seeks this relief on an *ex parte* basis because the FMLP feature of the
3 504 loan program is about to terminate. In order for the loans to participate in the FMLP program,
4 the agreements must be executed and delivered to the Pool Originator by August 31, 2012. The
5 Receiver has evaluated the loans and given notice of this application to the SBA. The Receiver
6 also circulated this application to counsel for the Securities and Exchange Commission and
7 counsel for Defendant Mark Feathers prior to filing. Neither has any opposition to the relief
8 requested. Seaman Declaration, ¶ 4.

III. PROCEDURAL BACKGROUND

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10 On June 21, 2012, the Securities and Exchange Commission ("Commission") filed its
11 Complaint against SB Capital, Mark Feathers ("Mr. Feathers"), IPF and SPF (collectively,
12 "Defendants"). The Commission simultaneously filed an Ex Parte Application for Temporary
13 Restraining Order and Order to Show Cause and an Ex Parte Application to Temporarily Seal the
14 Court's File for the Case. After a hearing held on June 26, 2012, the Court issued the Temporary
15 Restraining Order and Orders (1) Freezing Assets, (2) Prohibiting the Destruction of Documents,
16 (3) Granting Expedited Discovery, (4) Requiring Accountings, and (5) Appointing a Temporary
17 Receiver; and Order to Show Cause re Preliminary Injunction and Appointment of a Permanent
18 Receiver ("TRO"). The TRO appointed Thomas Seaman temporary receiver for the Receivership
19 Entities, and set an Order to Show Cause re: Preliminary Junction for July 10, 2012.

20 The Commission and Defendant Feathers stipulated to entry of the Preliminary Injunction
21 and Orders: (1) Freezing Assets; (2) Prohibiting the Destruction of Documents; (3) Requiring
22 Accountings; and (4) Appointing a Permanent Receiver ("Preliminary Injunction Order"). On
23 July 9, 2012, the Receiver filed his First Status Report and Inventory. On July 10, 2012, the Court
24 entered the Preliminary Injunction Order and instructed the Receiver to file his next status report
25 on August 10, 2012.

IV. THE LOANS

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27 There are two loans, both of which were funded pre-receivership, which the Receiver now
28 seeks authority to pool (the "Loans"). The first Loan is in the principal amount of \$3,395,000 to

1 borrower Milliken-Napa Creek, LLC ("Milliken"). The Milliken Loan is secured by a first
2 position deed of trust on a hotel property located at 1815 and 1821 Silverado Trail, Napa,
3 California. The interest rate on the Milliken Loan is 6.1%. Once the Milliken Loan is pooled, the
4 Receivership Entities will receive approximately \$2,885,000 from the sale of the 85% interest and
5 will be entitled to 6.1% interest on the remaining \$510,000 of the loan (\$2,592.50 per month), plus
6 an "excess servicing fee" of an additional 2.35% monthly interest on the \$2,885,000 portion of the
7 loan that is sold (\$5,649.79 per month). Seaman Declaration, ¶ 5.

8 The second Loan is in the principal amount of \$1,565,000 to borrower Clover Hotel
9 Partners ("Clover"). The Clover Loan is secured by a first position deed of trust on a hotel
10 property located at 811 W. Clover Road, Tracy, California. The interest rate on the Clover Loan is
11 based upon the 5-Year Libor Swap ("Index") plus 6.05% ("Margin"). As of the date of filing, the
12 Index plus Margin would produce a rate of 7.05%. The purchase price as calculated by the Pool
13 Originator is directly tied to the Index plus Margin on the date of settlement. Therefore, the
14 interest rate is currently floating at 7.99% and will convert to the fixed rate on the first calendar
15 day of the month in which the loan is pooled. Once the Clover Loan is pooled, the Receivership
16 Entities will receive approximately \$1,330,000 from the sale and will be entitled to Index plus
17 Margin rate of interest discussed above on the remaining \$235,000 of the loan, plus an "excess
18 servicing fee" of an additional 2.6% monthly interest on the \$1,330,000 portion of the loan that is
19 sold (\$2,881.66 per month). Seaman Declaration, ¶ 6.

20 Both Loans are included in the 504 loan program and were intended to be included in the
21 FMLP program. This process was close to being completed when the Receiver was appointed.
22 After the Loans were funded, the CDC issued second loans to each borrower funded by a
23 debenture issued by the CDC and guaranteed by the SBA. The debentures are secured by junior
24 liens on the subject properties. The remaining step is to pool the Loans such that 85% of them can
25 be sold with a guaranty from the SBA. Seaman Declaration, ¶ 7.

26 The "excess servicing fee" comes from the difference between the interest rate under the
27 promissory note and the interest rate received by the purchaser of the 85% interest. Because the
28 85% interest is guaranteed by the SBA, the interest rate paid to the purchaser is lower than the rate

1 under the note. The difference between the two rates is the "excess servicing fee" paid to the
 2 Receivership Entities each month as the holder of the other 15% interest and servicer of the Loan.
 3 Seaman Declaration, ¶ 8.

4 In order for the Loans to be pooled, the SBA has advised the Receiver that two agreements
 5 must be executed - the Third Party Lender Agreement ("TPLA") and the First Lien Position
 6 504 Loan Pool Guarantee Agreement ("First Lien Guarantee Agreement"). Seaman Declaration,
 7 Exhibits A and B. TPLA's for the Milliken and Clover Loans were executed and recorded prior to
 8 the Receiver's appointment. Seaman Declaration, Exhibits C and D. The TPLA and First Lien
 9 Guarantee Agreement set out the parties' respective rights and obligations. If the SBA executes
 10 the agreements, the Loans will be placed into a pool by a private entity called a Pool Originator.
 11 The Central Servicing Agent, an agent of the SBA, will then settle the purchase and sale of the
 12 loan interests in the pool to one or more pool investors. The Receivership Entities have
 13 commitments from Pool Originators for both Loans. Seaman Declaration, ¶ 9.

14 It is worth noting that executing the SBA agreements subjects the Loans to certain
 15 restrictions, including that the remaining 15% interest cannot be sold by the Receivership Entities
 16 without SBA approval. However, the Receivership Entities already hold 15% interests in fourteen
 17 (14) loans subject to the same restrictions. In addition, the economic benefit is substantial in that
 18 the receivership estate will receive cash in the total amount of \$4.216 million, the note rate of
 19 interest on the 15% interests that are retained (which, as discussed above, is to be determined for
 20 the Clover Loan), and monthly excess servicing fees in the total amount of \$8,531.45. Seaman
 21 Declaration, ¶ 10.

22 V. ARGUMENT

23 "The power of a district court to impose a receivership or grant other forms of ancillary
 24 relief does not in the first instance depend on a statutory grant of power from the securities laws.
 25 Rather, the authority derives from the inherent power of a court of equity to fashion effective
 26 relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of equity
 27 receiverships is to promote orderly and efficient administration of the estate by the district court
 28 for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the

1 appointment of a receiver is authorized by the broad equitable powers of the court, any distribution
2 of assets must also be done equitably and fairly. See *SEC v. Elliot*, 953 F.2d 1560, 1569 (11th Cir.
3 1992).

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

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

16 *Id.* (citations omitted); see also *Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.*,
17 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's
18 supervisory role, and 'we generally uphold reasonable procedures instituted by the district court
19 that serve th[e] purpose' of orderly and efficient administration of the receivership for the benefit
20 of creditors."). Accordingly, the Court has broad equitable powers and discretion in the
21 administration of the receivership estate and disposition of receivership estate assets.

22 Here, the Receiver seeks permission to complete the process of including the Milliken and
23 Clover Loans in the 504 loan program. The economic benefits of doing so are substantial - the
24 Receivership Entities receive \$4.216 million once the Loans are sold, monthly "excess servicing
25 fees" in the total amount of \$8,531.45, as well as the note rate of interest on the remaining 15%
26 interests. These terms are more favorable than could be obtained in a sale of the Loans outside the
27 FMLP program.

28 The Receivership Entities hold 15% interests in fourteen (14) other loans that have been
included in the 504 loan program and FMLP program. The Receiver will evaluate options for
maximizing the recovery from these loan interests, whether it be individually or as a portfolio, and
will seek relief from the Court at the appropriate time.

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VI. CONCLUSION

Based on the foregoing, the Receiver requests an order authorizing him, solely in his capacity as federal equity receiver, to execute whatever documents are required to conclude the pooling transactions, including, if necessary, the SBA agreements attached as Exhibits A and B to the Seaman Declaration, and to take other steps necessary to cause the Milliken and Clover loans to be pooled under the FMLP program.

Dated: August 21, 2012

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: _____ /s/ Ted Fates
TED FATES
Attorneys for Permanent Receiver
Thomas A. Seaman