

**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

JUL 23 2009  
JAMES W. McDOUGALL CLERK  
By: *Halley Robinson*

UNITED STATES OF AMERICA :

Plaintiff, :

v. :

SMALL BUSINESS INVESTMENT  
CAPITAL, INC. :

Defendant. :

Civil No. 4:09-CV-526 JMM

This case assigned to District Judge Moody  
and to Magistrate Judge Ray

**COMPLAINT FOR RECEIVERSHIP AND INJUNCTION**

COMES NOW Plaintiff, the United States of America, on behalf of its agency, the Small Business Administration, and for its cause of action states as follows:

**PARTIES, JURISDICTION AND VENUE**

1. This is a civil action brought by the United States on behalf of its agency, the Small Business Administration (hereinafter, "SBA," "Agency" or "Plaintiff"), whose central office is located at 409 Third Street, S.W., Washington, DC 20416.

2. 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.

3. Defendant, Small Business Investment Capital, Inc. (hereinafter "SBI Capital" or "Licensee"), is a corporation that maintains its principal place of business at

12103 Interstate 30, PO Box 3267, Little Rock, AR 72209. Venue is therefore proper under 15 U.S.C. §§ 687(d), 687h and 28 U.S.C. §1391(b).

### **STATUTORY AND REGULATORY FRAMEWORK**

4. SBI Capital 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) on March 6, 1975, SBA License No. 06/06-0175, solely to do business under the provisions of the Act and the regulations promulgated thereunder.

5. 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,

6. Section 303 of the Act, 15 U.S.C. §683, authorizes SBA to provide leverage to licensed SBICs such as SBI Capital.

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7. SBI Capital's Articles of Incorporation indicate that SBI Capital is to be operated in accordance with the Act and the Regulations governing SBICs

8. Pursuant to Section 303 of the Act, 15 U.S.C. §683, SBA provided Leverage to SBI Capital through the purchase and/or guaranty of Debentures, a form of Leverage, as those terms are defined under the Regulations. Currently, there is a total outstanding principal balance of \$2,250,000 that has matured and is currently due and owing. The Debenture is memorialized as SBA Loan No. 046757351-07.

9. The Debenture referenced in paragraph 8, above, is subject to the provisions

of 13 C.F.R. §§107.1810.

10. 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 SBI Capital, may be forfeited and the company may be declared dissolved.

11. Section 311 of the Act, 15 U.S.C. §687c, provides that if a determination by SBA that a Licensee such as SBI Capital, or any other person, 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.

**COUNT ONE**  
**DEFAULT IN REPAYMENT OF DEBENTURE**

12. Paragraphs 1 through 11 are incorporated herein by reference.

13. Section §107.1810(f)(3) of the Regulations provides that failure to make timely payment of an amount due SBA is a default with opportunity to cure.

14. Section §107.1810(g)(i),(ii) of the Regulations provides that upon SBA's providing a written notice of default to an SBIC, upon the SBA providing a defaulting

SBIC with fifteen (15) days to cure the default and upon the failure of the SBIC to cure the default, SBA can declare the entire indebtedness of an SBIC immediately due and payable and can institute proceedings to have SBA appointed as receiver of that SBIC.

15. By letter dated June 8, 2009, SBA informed SBI Capital that it was in default for failing to make timely payment on its Debenture on or before the due date of March 1, 2009.

16. By that same letter, SBA gave SBI Capital fifteen (15) days, or until June 23, 2009, to cure its default.

17. SBI Capital has failed to cure the default and remains in violation of the Act and Regulations.

18. As a direct consequence of the default, SBA has suffered, and continues to suffer, damages in the amount of \$ \$2,250,000 plus accrued interest through June 8, 2009 of \$114,249.07, with a per diem of \$446.30.

19. As a consequence of SBI Capital's failure to honor SBA's demand and SBI Capital's failure to cure its condition of default, SBA is entitled to the appointment of SBA as liquidating receiver of SBI Capital pursuant to Section 311 of the Act and Section 107.1810(g) of the Regulations.

**COUNT TWO  
FAILURE TO MAINTAIN QUALIFIED MANAGEMENT**

20. Paragraphs 1 through 19 are incorporated herein by reference herein.

21. Section 107.130 of the Regulations, 13 C.F.R. §107.130 (2009), provides

that an SBIC, such as SBI Capital, must demonstrate to SBA's satisfaction that it maintains management that is qualified and has the knowledge, experience and capability to run an SBIC, a federal financial institution.

22. SBA has been informed that one of SBI Capital's directors left the company in 2008 and that the President was removed for cause in 2009.

23. To the best of SBA's knowledge and belief, only one director whose responsibilities are administrative, remains at SBI Capital.

24. SBA has requested information regarding a new president and/or directors but has not received any such information.

25. SBA has determined that SBI Capital does not have qualified management to operate an SBIC, a federal financial institution, in violation of Section 107.130 of the Regulations.

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26. As a consequence of SBI Capital's failure to maintain qualified management, SBA is entitled to be appointed receiver under Section 311 of the Act in order to ensure that the operations of SBI Capital, a federal financial institution, continue unimpeded and protect the federal funds invested in SBI Capital.

27. The defendant SBI Capital and others have entered into a Co-operation Agreement, a copy of which is attached as Exhibit 1. The defendant, acting by and through its attorney Jan M. Hayden have signed a proposed consent order, a copy of which is attached as Exhibit 2.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

A. That injunctive relief, both preliminary and permanent in nature, be granted restraining SBI Capital, its officers, managers, directors, agents, employees, shareholders, and other persons acting in concert or participation therewith from: (1) making any disbursements of any assets of the SBI Capital; (2) using, investing, conveying, disposing, executing or encumbering in any fashion any assets of SBI Capital, wherever located; and (3) further violating the Act or the Regulations promulgated thereunder.

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

C. That this Court, pursuant to 15 U.S.C. §687c enter the proposed Consent Order and (1) take exclusive jurisdiction of SBI Capital and all of its assets, wherever located and (2) appoint SBA as receiver of SBI Capital for the purpose of marshaling and liquidating the assets of SBI Capital, satisfying the claims of creditors as determined by the Court.

D. That this Court enter judgment in favor of SBA and against SBI Capital in the amount of \$2,364,249.07, consisting of principal in the amount of \$2,250,000 plus accrued interest through June 8, 2009 of \$114,249.07, with a per diem of \$446.30 through the date of judgment and post judgment interest thereon.

E. That this Court grant such other relief it deems just and proper.

Respectfully submitted,

JANE W. DUKE  
UNITED STATES ATTORNEY

Dated: 7/23/09

By: Richard M. Pence, Jr.  
Richard M. Pence, Jr., AR BAR 69059  
Assistant United States Attorney  
425 W. Capitol, Suite 500  
Little Rock, AR 72201  
(501) 340-2600 phone  
(501) 340-2730 fax  
richard.pence@usdoj.gov

U.S. SMALL BUSINESS ADMINISTRATION

Dated: 7/23/09

By: Arlene M. Embrey Esq. RP  
Arlene M. Embrey, Esq.  
Trial Attorney  
U.S. Small Business Administration  
409 Third Street, Seventh Floor  
Washington, D.C. 20416  
Telephone: (202) 205-6976  
Facsimile: (202) 481-0324  
arlene.embrey@sba.gov

**CO-OPERATION AGREEMENT**

This Co-operation Agreement is made and entered into as of the 17<sup>th</sup> day of July, 2009, by and among the United States Small Business Administration (the "SBA"), Small Business Investment Capital, Inc. ("SBI Capital"), Sur Value Stamps, Inc. ("SVS") and U.S. Bank National Association ("U.S. Bank").

WHEREAS, the SBA has filed a complaint seeking to place SBI Capital, a licensed small business investment company, into receivership;

WHEREAS, SBA desires to file an order appointing SBA as receiver of SBI Capital with the consent of SBI Capital in order to minimize litigation costs and expenses;

WHEREAS, in order to obtain such consent, SVS, the parent company of SBI Capital, will appoint a duly authorized representative to act on behalf of SBI Capital;

WHEREAS, SVS and Affiliated Foods Southwest, Inc. ("AFS") are parties to a bankruptcy action styled In re Affiliated Foods, 4:09-bk-13178 currently pending in the United States Bankruptcy Court for the Eastern District of Arkansas (the "AFS/SVS Bankruptcy");

WHEREAS, SBA has been informed that assets or property of SBI Capital may be integrated or incorporated with property or assets of AFS and its other affiliates excluding SBI Capital (collectively, the "AFS Parties");

WHEREAS, U.S. Bank is a creditor in the AFS/SVS Bankruptcy and has a security interest in assets or property of the AFS Parties that may be integrated or incorporated with property or assets of SBI Capital;





WHEREAS the SBA, SVS and U.S. Bank (collectively "the Parties") have agreed to work together and cooperate in order manage and liquidate the assets or property of SBI Capital that may be integrated or incorporated with property or assets of AFS and its other affiliates in order to maximize the recovery to the receivership and bankruptcy estates;

NOW, THEREFORE, IT IS AGREED that in consideration of the mutual covenants and promises provided below, the Parties agree as follows:

1. The Parties consent to entry of the order filed simultaneously with the Complaint in the form attached hereto as Exhibit A appointing SBA as Receiver for Defendant;

2. Subsequent to the entry of the Order attached hereto as Exhibit A, SBA will recommend that the Receiver, to the extent that assets or property of SBI Capital are integrated or incorporated with property or assets of Affiliated Foods Southwest, Inc. and its other affiliates (collectively, the "AFS Parties"), shall work with the officers, employees and agents of the AFS Parties to identify and segregate such assets and property.

3. Subsequent to the entry of the Order attached hereto as Exhibit A, SBA will recommend that to the extent that there are documents, records, financial information or other information that relate to both SBI Capital and the AFS Parties (the "Common Information"), the Receiver and the officers, employees and agents of the AFS Parties shall develop appropriate measures and procedures so that both the Receiver and the AFS Parties will have appropriate access to the Common Information. To the extent that the parties cannot agree as to (a) the property and assets belonging to SBI Capital, or

(b) the measures and procedures for sharing access any Common Information, either party may seek relief or redress from the Receivership Court.

4. Subsequent to the entry of the Order attached hereto as Exhibit A, SBA will recommend that the Receiver agree that in the event the Receiver transfers, compromises, or otherwise disposes of any claim or asset listed on SBI Capital's SBA Form 468 as of December 18, 2008 as having a value in excess of \$100,000.00 and such transfer, compromise, or disposition equals an amount less than ninety percent (90%) of the book value of such claim or asset, the Receiver shall notify SVS and U.S. Bank via e-mail and overnight mail at least fourteen (14) calendar days prior to closing and finalizing and such transfer, compromise, or disposition.

5. Notice of the transfer, compromise, or dispositions described in paragraph 4, above, shall be given by the Receiver to the following:

Mark V. Bossi  
Thompson Coburn LLP  
One U.S. Bank Plaza  
St. Louis, MO 63101  
[mboffi@thompsoncoburn.com](mailto:mboffi@thompsoncoburn.com)

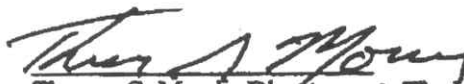
Suzanne E. Geiger  
Senior Vice President  
U.S. Bank Business Credit  
Loc: CN-OH-W14S425 Walnut Street, 14th Floor  
Cincinnati, OH 45202  
[suzanne.geiger@usbank.com](mailto:suzanne.geiger@usbank.com)

Jan M. Hayden  
Draper, Hayden, Patrick & Horn L.L.C.  
650 Poydras Street, Suite 2500  
New Orleans, LA 70130  
[jhayden@hellerdraper.com](mailto:jhayden@hellerdraper.com)

In addition, notice shall be provided to any trustee appointed in the AFS/SVS  
Bankruptcy.

Executed this 17<sup>th</sup> day of July, 2009.

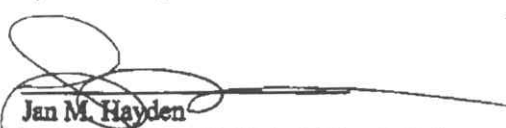
United States Small Business Administration

  
Thomas G. Morris, Director 07-17-09  
Office of Liquidation

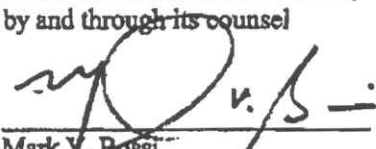
Small Business Investment Capital, Inc.,  
by and through its counsel

  
Jan M. Hayden  
Draper, Hayden, Patrick & Horn L.L.C.  
650 Poydras Street, Suite 2500  
New Orleans, LA 70130  
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Sur Value Stamps, Inc.,  
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U.S. Bank National Association,  
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Thompson Coburn LLP  
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St. Louis, MO 63101  
[mbossi@thompsoncoburn.com](mailto:mbossi@thompsoncoburn.com)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	:
	:
Plaintiff,	: Civil No.
	:
v.	:
	:
SMALL BUSINESS INVESTMENT CAPITAL, INC.	:
	:
Defendant.	:
_____	:

**CONSENT ORDER**

Before this Court is the Complaint by the United States of America, on behalf of the United States Small Business Administration ("SBA"), for a permanent injunction and the appointment of the SBA as Permanent Receiver for Small Business Investment Capital, Inc. ("SBI Capital"). The Court, being fully advised as to the merits, and based upon the consent of the parties, believes this relief should be granted:

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. Pursuant to the provisions of 15 U.S.C. § 687c, this Court shall take exclusive jurisdiction of SBI Capital and all of its assets, wherever located, and the United States Small Business Administration ("SBA"), is hereby appointed receiver ("the Receiver") of SBI Capital to serve without bond until further order of this Court. The Receiver is appointed for the purpose of administering, marshalling and, if necessary, liquidating all of SBI Capital's assets to satisfy the claims of creditors therefrom in the order of priority as determined by this Court.

2. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the officers, managers, and directors of SBI Capital under applicable state and federal law and by the Articles of incorporation and By-Laws of said corporation, in addition to all powers



and authority conferred upon the Receiver by the provisions of 15 U.S.C. § 687c and 28 U.S.C. § 754. The officers, managers, directors, officers, employees and agents of SBI Capital are hereby dismissed. Such persons shall have no authority with respect to SBI Capital's operations or assets, except as may hereafter be expressly granted by the Receiver. The Receiver shall assume and control the operation of SBI Capital and shall pursue and preserve all of its claims.

3. The past and/or present officers, directors, agents, managers, accountants, attorneys and employees of SBI Capital, as well as all those acting in their place, are hereby ordered and directed to turn over to the Receiver forthwith all books, records, documents, accounts and all other instruments and papers of said corporation and all other assets and property of the corporation, whether real or personal. SBI Capital shall furnish a written statement within five (5) days after the entry of this Order, listing the identity, location and estimated value of all assets of SBI Capital as well as the names, addresses and amounts of claims of all known creditors of SBI Capital. All persons having control, custody or possession of any assets or property of SBI Capital, including its former officers, are hereby directed to turn such property over to the Receiver.

4. The Receiver shall promptly give notice of its appointment to all known officers, directors, agents, managers, employees, shareholders, creditors, debtors, and agents of SBI Capital. All persons and entities owing any obligations or debts to SBI Capital shall, until further order of this Court, pay all such obligations in accordance with the terms thereof to the Receiver, and its receipt for such payments shall have the same force and effect as if SBI Capital had received such payments.

5. The Receiver is hereby authorized to open such Receiver's bank accounts, at banking or other financial institutions, to extend credit on behalf of SBI Capital, to utilize SBA personnel, and to employ such other personnel as necessary to effectuate the operation of the

receivership including, but not limited to, attorneys and accountants, and is further authorized to expend receivership funds to compensate such personnel in such amounts and upon such terms as the Receiver shall deem reasonable in light of the usual fees and billing practices and procedures of such personnel. The Receiver is not required to obtain Court approval prior to the disbursement of receivership funds for payments to personnel employed by the Receiver or payments for expenses incidental to administration of the Receivership. In addition, the Receiver is authorized to reimburse the SBA or its employees for travel expenses incurred by SBA personnel in the establishment and administration of the receivership. The Receiver may, without further order of this Court, transfer, compromise, or otherwise dispose of any claim or asset, other than real estate, which would result in net proceeds to the Receiver and the receivership estate.

6. SBI Capital's past and/or present officers, directors, agents, managers, shareholders, employees, and other appropriate persons (including, without limitation, the defendant's portfolio of small business concerns and banks or other financial institutions doing business with defendant and/or defendant's portfolio of small business concerns) shall answer under oath, pursuant to a Receiver's Notice or Subpoena, to the Receiver, all questions which it may put to them regarding the business of said corporation, or any other matter relevant to the operation or administration of the receivership or the collection of funds due to SBI Capital. In the event that the Receiver deems it necessary to require the appearance of the aforementioned persons, the production of documents, information, or any other form of discovery concerning the assets, property or business assets of SBI Capital or any other matter relevant to the operation or administration of the Receivership or the collection of funds due to SBI Capital, the Receiver shall direct notice for any such appearance by certified mail, and said persons shall appear and give answer to the Receiver, produce documents or submit to any other form of discovery in accordance with the Federal Rules of Civil

Procedure.

7. The parties or prospective parties to any and all civil legal proceedings wherever located (including, but not limited to arbitration proceedings, bankruptcy or foreclosure actions, default proceedings, or any other proceedings) that involve (i) SBI Capital; or (ii) any assets of SBI Capital; (iii) any of SBI Capital's present or past officers, directors, managers or the Receiver while acting in their official capacity, are enjoined from taking any action of any nature in connection with any such civil legal proceeding until further Order of this Court.

8. All civil legal proceedings wherever located (including arbitration proceedings, foreclosure activities, bankruptcy actions, or default proceedings, but excluding the instant proceeding) involving (i) SBI Capital; (ii) any of SBI Capital's assets; (iii) or any action of any nature taken by SBI Capital's present or past officers, directors, managers or the Receiver while acting in their official capacity are stayed in their entirety, and all Courts having any jurisdiction thereof are enjoined from taking or permitting any action in such proceeding until further Order of this Court. Nothing herein shall prohibit any party from participating or prosecuting their rights, remedies or causes of action in the bankruptcy proceedings of Affiliated Foods Southwest, Inc et al pending in the Eastern District of Arkansas and bearing proceeding number 4:09-bk-13178.

9. Further, as to a cause of action accrued or accruing in favor of SBI Capital against a third person or party, any applicable statute of limitation is tolled to the extent allowed by applicable law during the period in which this injunction against commencement of legal proceedings is in effect as to that cause of action.

10. SBI Capital and its past and/or present directors, officers, managers, shareholders, agents, employees and other persons acting in concert or participation therewith be, and they hereby are, enjoined from either directly or indirectly taking any actions or causing any such action

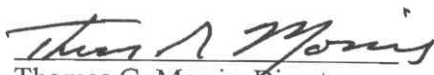
to be taken which would dissipate the assets and property of SBI Capital to the detriment of the Receiver appointed in this cause, including but not limited to destruction of corporate records, or which would violate the Small Business Investment Act of 1958, as amended, (the "SBIA"), 15 U.S.C. Section 661 et seq., or the regulations promulgated thereunder, (the "Regulations"), 13 C.F.R. § 107.1 et seq.

11. The Receiver is authorized to borrow on behalf of SBI Capital, from the SBA, up to \$100,000, and is authorized to cause SBI Capital to issue Receiver's Certificates of Indebtedness in the principal amounts of the sums borrowed, which certificates will bear interest at or about 10 percent per annum and will have a maturity date no later than 18 months after the date of issue. Said Receiver's Certificates of Indebtedness shall have priority over all other debts and obligations of SBI Capital, excluding administrative expenses of the Receivership, whether presently existing or hereinafter incurred.

12. This Court determines and adjudicates that SBI Capital has violated the Regulations as alleged in the Complaint filed in this matter. After completing its activities in accordance with this Order, the Receiver may recommend that SBI Capital's license as an SBIC be revoked.

13. This Court hereby enters judgment in favor of SBA and against SBI Capital in the amount of \$2,364,249.07, consisting of principal in the amount of \$2,250,000 plus accrued interest through June 8, 2009 of \$114,249.07, with a *per diem* of \$446.30 through the date of judgment and post judgment interest thereon.

**UNITED STATES SMALL BUSINESS ADMINISTRATION**

By:   
Thomas G. Morris, Director  
Office of SBIC Liquidation



**SMALL BUSINESS INVESTMENT CAPITAL, INC.**

By: \_\_\_\_\_

Jan M. Hayden, La. Bar No. 6672  
Tristan Manthey, La. Bar No. 24539  
Greta M. Brouphy, La. Bar No. 26216

**HELLER, DRAPER, HAYDEN,  
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**Counsel for Small Business Investment Capital, Inc.**

**and**

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W. Michael Reif, Ar. BAR NO. 84128

**Dover Dixon Horne, PLLC**

425 W. Capitol Avenue Suite 3700  
Little Rock, Arkansas 72201-3465  
Telephone: 501-375-9151  
Facsimile: 501-375-6484

**Local Counsel for Small Business Investment Capital, Inc.**

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**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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**THE HONORABLE  
UNITED STATES DISTRICT JUDGE**