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

12 SECURITIES AND EXCHANGE
 COMMISSION,
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 Plaintiff,
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 vs.
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 16 SMALL BUSINESS CAPITAL CORP.;
 MARK FEATHERS; INVESTORS PRIME
 FUND, LLC; and SBC PORTFOLIO
 17 FUND, LLC,
 18
 Defendants.

Case No. CV12-03237

MOTION FOR AUTHORITY TO:

- (A) **SELL NATOMA PROPERTY;**
- (B) **SELL SWEET FINGERS PROPERTY;**
- (C) **SELL WHISKEY JUNCTION
PROPERTY; AND**
- (D) **ACCEPT DISCOUNTED PAYOFF
FROM THE FOUR BROTHERS
INNS, LLC**

Date: August 23, 2013
 Time: 9:00 a.m.
 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, "Receivership Entities"),
4 hereby moves for authority to (a) sell real property located at 1350 Natoma Street, #4,
5 San Francisco, California ("Natoma Property"); (b) sell real property located at 464 East
6 14th Street, San Leandro, California ("Sweet Fingers Property"), (c) sell real property located at
7 4479 S. Whiskey Slough Road, Holt, California ("Whiskey Junction Property"); and (c) accept a
8 discounted payoff of a loan made to The Four Brothers Inns, LLC ("TFBI").¹

9 I. INTRODUCTION

10 As discussed in the Receiver's Fourth Interim Report ("Fourth Report"), at the time of the
11 Receiver's appointment, the Receivership Entities owned two pieces of real property acquired
12 from borrowers - the Sweet Fingers Property and the Natoma Property. Docket No. 167,
13 pp. 10-11. On March 8, 2013, the Receiver completed a foreclosure on the Whiskey Junction
14 Property (loan made to Rico Espana). Collectively, the Sweet Fingers Property, the Natoma
15 Property and the Whiskey Junction Property are referred to herein as the Properties. The
16 Properties have a total estimated value of approximately \$1.5 million.

17 The Properties are not necessary for the Receivership Entities' ongoing operations and
18 represent an ongoing drain on resources. Continuing to hold these Properties involves payment of
19 insurance, property taxes, and maintenance costs. Two of the properties are vacant and produce
20 no income. The uniqueness of these Properties would not enhance the value of the loan portfolio
21 or business such that a greater value could be obtained by holding them for a sale of the entire
22 business or loan portfolio. Therefore, the Receiver recommends that they be sold now. The
23 proposed sales will convert nonproductive assets to cash.

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27 ¹ Accepting a loan payoff is something done in the ordinary course of the Receivership Entities'
28 lending/servicing business, and therefore is within the Receiver's existing authority under the Preliminary Injunction Order. Dkt. No. 34, Part VII. Nevertheless, the proposed payoff is a significant discount on the total amount owed on the loan. Accordingly, in an abundance of caution, the Receiver seeks authority to accept the proposed payoff.

1 Accordingly, in order to maximize the value of each asset and reduce expenses associated
2 with the sales, and thereby maximize the recovery for the benefit of investors, the Receiver seeks
3 authority to sell the Properties via private sales. The Receiver has engaged real estate brokers on
4 terms standard in the real estate industry, has listed the Properties at appropriate prices based on
5 comparable sales and the unique characteristics of the Properties, and is widely marketing the
6 Properties through appropriate channels based on their locations and property types. The Receiver
7 will entertain offers, negotiate with potential buyers, identify the highest and best offers (and, in
8 the case of the Natoma Property, has already gone through these steps), and complete the sales
9 transactions, subject to the authorization requested herein. The purchase prices and net recoveries
10 will be reported in the Receiver's interim reports to the Court.

11 The Receiver believes that given the nature of the Properties and their estimated values, the
12 costs associated with publishing notices, obtaining further appraisals, filing additional sale
13 motions, and holding public auctions (as may be called for under 28 U.S.C. §§ 2001 and 2002)
14 outweigh the likelihood of obtaining higher sale prices as a result of such activities. Granting the
15 requested waiver of 28 U.S.C. §§ 2001 and 2002 and approving the Receiver's sales process will
16 significantly reduce expenses associated with the sales and thereby enhance the recovery for the
17 receivership estate.

18 Finally, the Receiver requests authority to accept a discounted payoff of a loan made to
19 TFBI. This loan is discussed in the Fourth Report at pp. 6-7 and is secured by a bed and breakfast
20 in Calistoga, California known as The Brannan Cottage Inn. The Receiver and TFBI previously
21 executed a Forbearance and Discounted Payoff Agreement. TFBI has since agreed to an offer to
22 purchase the property for \$895,000. The estimated total net recovery from the sale for the
23 receivership estate is \$838,000. The Receiver believes that the proposed payoff will produce a
24 higher net recovery than foreclosing on the collateral, and therefore requests authority to accept
25 the payoff.

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1 **II. BACKGROUND FACTS**

2 **A. The Natoma Property**

3 In October 2008, SPF made a loan in the amount of \$350,000 to 1350 Natoma
 4 Street, LLC.² The loan was guaranteed by Enda Keane. The initial term was nine months at an
 5 interest rate of 11% fixed, interest only. The loan was secured by a second Deed of Trust on four
 6 units of an eight unit condominium complex. The complex, which was built in 2007 and is
 7 located in the Mission District of San Francisco, contains eight residential loft-style
 8 condominiums. Upon completion, four units were sold and four units were held as income
 9 properties to be leased out for the term of one year prior to their sale. The builder (and borrower)
 10 received a tax exemption for leasing four of the units rather than immediately putting them up for
 11 sale. The source of repayment was expected to be the sale of one or more of the four
 12 condominiums when the leases expired. However, when the leases started to expire and the loan
 13 matured, the borrower did not want to sell at the lowest point in the market. Another project he
 14 was building in San Francisco was near completion and he offered to repay the loan from the sale
 15 of this project. However, the project did not generate sufficient proceeds to pay off the debt to
 16 SPF. SPF extended the term, but the borrower was unable to pay off the loan. SPF took
 17 ownership of Unit #4 in November 2010 by deed in lieu of foreclosure as part of a loan workout.
 18 The borrower owed SPF a total of \$348,483 at the time of the deed in lieu of foreclosure.
 19 Declaration of Thomas Seaman filed herewith ("Seaman Declaration"), ¶ 2.

20 After SPF acquired title, it took out a new loan secured by the property in the amount of
 21 \$400,000. At the time of the Receiver's appointment, the condominium was occupied by an
 22 SB Capital employee at significantly below market rent. The tenant was paying \$2,000 per
 23 month, while market rent was approximately \$3,750 per month. The Receiver served the tenant
 24 with a 60-day notice of his intent to increase the rent and eventually agreed to allow the tenant to
 25 vacate no later than January 31, 2013, while continuing to pay the current rent of \$2,000 per
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27 _____
 28 ² 1350 Natoma Street, LLC is a single member California limited liability company formed in
 January 2006 by Enda Keane for the purpose of holding title to the subject real property
 located at 1350 Natoma Street, San Francisco, California.

1 month. The tenant provided the Receiver with a 30-day notice of his intent to vacate and vacated effective January 1, 2013. The loan on the property matured in November 2012 and was paid off in full by the Receiver. The total amount paid was \$393,506.77. Seaman Declaration, ¶ 3.

The Receiver engaged a broker and listed the property for sale in February 2013 at \$715,000, subject to Court approval, based on comparable sales in the immediate area. The Receiver received two offers, negotiated with the potential buyers, and identified \$762,000 as the highest and best offer. The proposed purchaser, Mike Jacobson, has deposited \$22,860 into escrow, is required to deposit another \$22,860 at the end of the contingency period, and is prepared to close within 65 days³ of entry of an order authorizing the sale. The Receiver seeks authority to conclude the sale. Seaman Declaration, ¶ 4.

B. The Sweet Fingers Property

In 2006, IPF made a loan in the amount of \$552,500 secured by the Sweet Fingers Property, which is located at 464 East 14th Street, San Leandro, California. The Sweet Fingers Property includes an operating restaurant called Sweet Fingers on the first floor and a residential apartment on the second floor. SB Capital acquired the loan from IPF in May 2008. The borrower defaulted and SB Capital foreclosed in June 2008 and took title to the property with a credit bid of \$600,534. Seaman Declaration, ¶ 5.

SB Capital leased the Sweet Fingers Property back to the former borrower for \$4,500 per month (for both the restaurant and apartment) on a month-to-month lease. In July 2008, IPF made a loan to SB Capital secured by the property in the amount of \$700,000. The loan is listed as Loan 65 on IPF's books. Mr. Feathers personally guaranteed the loan. In December 2008, the loan was increased from \$700,000 to \$800,000. In December 2009, the loan was increased from \$800,000 to \$900,000. In June 2011, the maturity date of the loan was extended from January 31, 2011 to January 31, 2012. The Sweet Fingers loan was carried on SB Capital's books at \$900,000, although a broker's opinion of value dated August 2012 values the property at \$449,000. The

³ The title company will not issue the title insurance policy until the order authorizing the sale has become final. In this case, because a federal agency is a party, the appeal period is 60 days. 28 U.S.C. § 2107.

1 treatment of this loan and REO is troubling because it appears to have been used as a means of
2 overstating IPF net income, disguising a defaulted loan, and transferring money from IPF to
3 SB Capital. Seaman Declaration, ¶ 6.

4 The payment performance on the lease to the former borrower was sporadic. At the time
5 of the Receiver's appointment in June 2012, the tenant had not made any lease payments since
6 February 2012. The Receiver filed a complaint for unlawful detainer against the tenant in
7 September 2012. The complaint resulted in a settlement including a Stipulated Judgment, which
8 requires the tenant to pay \$3,500 per month in rent beginning November 15, 2012 and continuing
9 on a month-to-month basis or until the Sweet Fingers Property is sold. If the Sweet Fingers
10 Property is sold to an owner/user, then the tenant has agreed to vacate within 60 days. In the event
11 of a default on either the monthly rent payments or the agreement to vacate the property, a
12 Stipulated Judgment for possession and a money judgment in the amount of \$65,000 will be
13 entered. As of March 31, 2013, the tenant was current on the monthly payments pursuant to the
14 settlement agreement. Seaman Declaration, ¶ 7.

15 In September 2012, the Receiver engaged a broker and listed the Sweet Fingers Property
16 for sale at \$449,000 based on a careful review of comparable sales in the area. No offers have
17 been received to date. In consultation with the broker, the Receiver is considering reducing the list
18 price. The Receiver seeks authority to sell the property. Seaman Declaration, ¶ 8.

19 **C. The Whiskey Junction Property**

20 In November 2006, IPF made a loan in the amount of \$381,000 to Jesse and Joyce Burnett.
21 The loan was secured by the Whiskey Junction Property, which is located at 4479 S. Whiskey
22 Slough Road in Holt, California. The Whiskey Junction Property, which is located near the
23 California delta, is set up for use as a restaurant/bar. The borrower defaulted and IPF recorded a
24 Notice of Default on November 5, 2007. A Notice of Trustee's Sale was recorded in
25 February 2008, showing \$426,147 due. On March 6, 2008, IPF made a loan in the amount of
26 \$447,851.63 to SB Capital. The next day, SB Capital purchased the property at the foreclosure
27 sale for \$428,157. Seaman Declaration, ¶ 9.

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1 The property was listed on the Multiple Listing Service (MLS) in April 2008 for \$460,000
2 and then sat vacant for a number of years. Between November 2009 and March 2010, IPF made
3 several additional advances to SB Capital, increasing the loan balance to \$659,150. The Receiver
4 is informed that beginning in 2011, Mr. Feathers began some capital improvements to the interior
5 and exterior of the Whiskey Junction Property and also purchased some restaurant equipment. In
6 November 2011, the loan was transferred to SPF and SPF advanced another \$364,000 to
7 SB Capital. In December 2011, the loan, which at the time totaled \$1,023,089.23, was transferred
8 back to IPF. Seaman Declaration, ¶ 10.

9 Rico Espana, an acquaintance of Mr. Feathers, borrowed a total of \$1,155,000 from IPF to
10 purchase the Whiskey Junction Property from SB Capital. The property was sold to Mr. Espana
11 on May 31, 2012, for \$1,054,500. IPF was granted a first position deed of trust on the property to
12 secure the loan. Seaman Declaration, ¶ 11.

13 Mr. Espana intended to open a restaurant/bar on the property called Whiskey Junction.
14 Mr. Espana, however, had no liquor license, no working capital, no inventory, and no ability to
15 service the debt. Prior to the Receiver's appointment, the Receivership Entities obtained a liquor
16 license and formed an entity called Whiskey Junction, LLC, which holds the license. The
17 understanding was that Mr. Espana would be permitted to operate the restaurant/bar under the
18 Whiskey Junction, LLC liquor license. After the Receiver was appointed, Mr. Espana stated he
19 was willing to either do a short sale or a deed in lieu of foreclosure. Seaman Declaration, ¶ 12.

20 After consulting with counsel, the Receiver determined that a foreclosure was the best
21 course of action. The foreclosure was completed on March 8, 2013. The Receiver engaged a
22 broker to list the property. The Receiver has also engaged a consultant with extensive expertise in
23 transferring liquor licenses. The Receiver will seek to sell the property and transfer the license to
24 one buyer who will operate the restaurant/bar under the license. Seaman Declaration, ¶ 13.

25 The Receiver obtained an appraisal of the Whiskey Junction Property in September 2012,
26 which estimates the value to be \$230,000. However, the Receiver believes a price closer to
27 \$300,000 is attainable, based on the value of the restaurant equipment recently installed (estimated
28 at \$50,000) and the liquor license, as well as interest expressed by potential purchasers to date.

1 The Receiver currently has one offer for the property, equipment and liquor license for \$275,000.
2 The Receiver is working with the broker to counter this offer, subject to Court authorization to
3 complete the sale. Seaman Declaration, ¶ 14.

4 **D. The Four Brothers Inns, LLC**

5 TFBI owns and operates The Brannan Cottage Inn in Calistoga, California. The Brannan
6 Cottage Inn is a six-room bed and breakfast, listed on the National Register of Historic Places. It
7 was built in 1860 by Samuel Brannan, Calistoga's founder. Calistoga is in the heart of California's
8 wine country, and the inn is well located and well maintained. The loan of \$950,000 was made by
9 IPF in March 2008. The loan is guaranteed by TFBI's principals, Douglas and Judith Cook
10 ("Guarantors"). The total advanced was subsequently increased to \$1,215,500 via modifications
11 to the loan. The loan has been in default since October 1, 2011, and subsequently matured on
12 January 31, 2012. IPF recorded a Notice of Default on April 18, 2012. Seaman Declaration, ¶ 15.

13 The property was listed for sale in April 2009 with a list price of \$1,350,000. In
14 October 2009, the price was reduced to \$1,195,000. In September 2011, the price was further
15 reduced to \$1,085,000 and later to \$995,000. Throughout this period and during the receivership,
16 there has been some interest in the property, but no offers have been made. The Receiver
17 consulted with the broker (who specializes in the hospitality industry in the Calistoga/Napa Valley
18 area) about the property and market conditions. The broker advised that selling the property as an
19 ongoing business rather than as a vacant building, and using experienced B&B managers, will
20 increase the value of the property by 20%. Accordingly, the Receiver determined it was in the
21 best interest of the receivership estate to not foreclose, enter into a forbearance agreement, and
22 keep TFBI in place to manage the business while the property is marketed for sale. Seaman
23 Declaration, ¶ 16.

24 The Receiver executed a Forbearance and Discounted Payoff Agreement ("Forbearance
25 Agreement") with TFBI which provides for the owners to continue to operate the business and
26 turn over net operating income to the Receiver on a bi-monthly basis to be applied toward interest,
27 while the property is being marketed. TFBI has been providing the bi-monthly reports as agreed
28 and has paid a total of \$13,926.10 in interest to date. The Forbearance Agreement requires TFBI

1 to pay the Receiver the greater of the net proceeds from the sale or \$890,000 ("Discounted Payoff
2 Amount") no later than May 31, 2013. If the Discounted Payoff Amount is paid on or before the
3 deadline, and TFBI has complied with all other requirements under the Forbearance Agreement,
4 the payoff will fully satisfy the loan. Seaman Declaration, ¶ 17.

5 Following execution of the Forbearance Agreement, the borrower reduced the asking price
6 from \$995,000 to \$975,000 and the broker initiated a new marketing program to ignite renewed
7 interest in the property. One problem is that the property does not include "owner's quarters."
8 Most B&Bs include an owner's apartment, which provides a significant benefit to
9 owners/managers. While this has already been factored into the list price, it appears to be a
10 significant impediment for some potential buyers. Seaman Declaration, ¶ 18.

11 In March 2013, TFBI received an offer for the property in the amount of \$750,000. The
12 parties negotiated and agreed on a price of \$895,000. The Receiver anticipates that the net
13 proceeds from the sale will be approximately \$838,000. The Receiver has conducted a
14 preliminary investigation into the assets of the Guarantors. His investigation indicates that the
15 Guarantors have no assets of significant value that would be a source of recovery. Furthermore,
16 TFBI has no assets other than the property. Accordingly, the Receiver believes the proposed
17 payoff will produce a higher net recovery for the receivership estate than enforcing IPF's rights
18 under the loan documents. Seaman Declaration, ¶ 19.

19 III. ARGUMENT

20 A. Broad Equitable Powers of the Court

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

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

6 A district court's power to supervise an equity receivership and to
 7 determine the appropriate action to be taken in the administration of
 8 the receivership is extremely broad. The district court has broad
 9 powers and wide discretion to determine the appropriate relief in an
 10 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.

11 *Id.* (citations omitted); *see also Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.*,
 12 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's
 13 supervisory role, and 'we generally uphold reasonable procedures instituted by the district court
 14 that serve th[e] purpose' of orderly and efficient administration of the receivership for the benefit
 15 of creditors."). Accordingly, the Court has broad equitable powers and discretion in the
 16 administration of the receivership estate and disposition of receivership assets.

17 **B. Real Property Sales**

18 Here, the Receiver seeks authority to sell the Properties with an aggregate value of
 19 approximately \$1.5 million. One property – the Natoma Property – is already most of the way
 20 through the sale process. The highest and best offer has been identified, the buyer's deposit is in
 21 escrow, and the sale will close within 65 days of Court approval. The other two properties - Sweet
 22 Fingers and Whiskey Junction - are in the earlier stages of the sale process. The Receiver has
 23 evaluated these two properties and engaged real estate brokers to market them. As noted above,
 24 an offer has been received on the Whiskey Junction Property.

25 In light of the relatively modest values of these Properties, minimizing transaction costs is
 26 critically important. Rather than following the procedures set forth in 28 U.S.C. §§ 2001 and
 27 2002, the Receiver recommends that the Properties be sold in private sales that follow customary
 28 real estate sale procedures, including engaging qualified real estate brokers and listing and

1 marketing the Properties through appropriate channels. The Receiver will then entertain offers,
2 negotiate with potential buyers and execute purchase and sale agreements, using licensed escrow
3 companies. If multiple competitive offers are received for one property, the Receiver, in his
4 business judgment, will determine whether a private auction will enhance the recovery for the
5 receivership estate, and if so, will conduct such an auction (either telephonically or by e-mail).

6 While the letter of 28 U.S.C. §§ 2001 and 2002 contemplate publishing notices, obtaining
7 appraisals, preparing further sale motions, and conducting public auctions, such tasks will result in
8 substantial expense and are unlikely to yield higher sales prices. In fact, the Receiver believes that
9 the likely benefits from such activities (*i.e.*, the potential for higher sale prices) are outweighed by
10 the costs to the receivership estate. Furthermore, Court approval of each individual sale adds
11 considerable delay to the sale closing process. Noticed motions take time to be heard and title
12 companies will not insure title until a sale order has become final (in this case, 60 days after entry
13 of the order). Some potential buyers are unwilling to wait the additional time and will move on to
14 other real estate opportunities. This has the potential to adversely impact the sale prices for the
15 Properties.

16 Accordingly, the Receiver requests authority to sell the Properties in private sales, as
17 described above, and asks the Court to waive all further requirements, including the publication,
18 appraisal and public auction requirements.

19 **C. TFBI Loan Payoff**

20 The Receiver seeks authority to accept a discounted payoff of the loan made to TFBI.
21 After extensive marketing and several reductions to the list price, an offer was received and the
22 parties negotiated and agreed on a price of \$895,000. The Receiver anticipates that the net
23 proceeds from the sale will be approximately \$838,000. Although this amount is less than the
24 \$890,000 minimum payoff provided in the Forbearance Agreement and is a significant discount
25 on the total owed by TFBI, the Receiver recommends that TFBI be authorized to complete the sale
26 and the net sale proceeds be accepted in full satisfaction of the loan.

27 The property has been listed for sale continuously for the last four years. A higher and
28 better offer is unlikely to be received. The Receiver has conducted a preliminary investigation

1 into the assets of the Guarantors. His investigation indicates that the Guarantors have no assets of
2 significant value that would be a source of recovery. Furthermore, TFBI has no assets other than
3 the property. Accordingly, enforcement of IPF's remedies under the loan documents is likely to
4 produce a net recovery significantly lower than the proposed payoff, especially considering the
5 costs of foreclosing on, holding and operating the property until it can be sold by the Receiver.

6 **IV. CONCLUSION**

7 WHEREFORE, the Receiver requests an order (a) authorizing him to sell the Natoma,
8 Sweet Fingers and Whiskey Junction Properties in private sales, as described above, (b) waiving
9 the requirements under 28 U.S.C. §§ 2001 and 2002 in connection with such sales, and
10 (c) authorizing the Receiver to accept the discounted payoff of the TFBI loan described above.

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12 Dated: April 24, 2013

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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14 By: _____ /s/ Ted Fates

TED FATES
Attorneys for Receiver
Thomas A. Seaman

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