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8 CELTIC BANK

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 SECURITIES & EXCHANGE) Case No.: 5:15-CV-02387-SVW(KKx)
12 COMMISSION,)
13) JUDGE: HON. STEPHEN V. WILSON
Plaintiff,) Courtroom: 6
14 vs.)
15) **SUPPLEMENTAL BRIEF OF THIRD**
ROBERT YANG, et al.) **PARTY SECURED CREDITOR,**
16) **CELTIC BANK, RE EX PARTE**
Defendants.) **APPLICATION OF RECEIVER,**
17) **STEPHEN J. DONNELL, FOR**
and) **ORDER TO SHOW CAUSE WHY**
18) **CELTIC BANK SHOULD NOT BE**
19 YANROB’S MEDICAL, INC., et al.,) **HELD IN CIVIL CONTEMPT**
20 Relief Defendants.)
21) Date: May 9, 2016
22) Time: 1:30 p.m.
23) Ctrm.: 6

23 In connection with the hearing scheduled by this Court for May 9, 2016,
24 regarding the Receiver’s Ex Parte Application for issuance of an Order to Show Cause re
25 Contempt against Third Party Secured Creditor Celtic Bank, Celtic Bank requests that
26 the Court consider the following issues, in conjunction with those discussed in its
27 Opposition filed on April 8, 2016 [Dkt. No. 52]:
28

1 **1. The Proceeds in Dispute Are Not in Danger of Being Dissipated by Celtic**
2 **Bank Pending a Final Determination as to Celtic Bank’s Right to These**
3 **Proceeds. However, to Date, the SEC and Receiver Have Not Made a**
4 **Similar Commitment.**

5 Celtic Bank has consistently made it clear to the SEC and the Receiver (through
6 his counsel) that Celtic Bank has and will continue to maintain the funds in question
7 without dissipation of the proceeds in question pending a final determination of the
8 rights to these proceeds. The last meet and confer between counsel for Celtic Bank and
9 counsel for the Receiver was on May 2, 2016. While a possible stipulation was discussed
10 in the May 2, 2016 meet and confer as to the segregation of the cash collateral, to date,
11 the Receiver and SEC have not agreed to same and have instead demanded the
12 unconditional turnover of Celtic Bank’s cash collateral. Without assurances from the
13 SEC and Receiver that the cash collateral would be maintained in a segregated account
14 pending a final determination of who has the rights to the cash collateral and that by
15 turning over the cash collateral would not diminish its claims, Celtic Bank has simply
16 not been in a position to relinquish direct control of the proceeds.

17 **2. Issuance of an Order to Show Cause is Premature and Would Violate**
18 **Celtic Bank’s Constitutional Right to Due Process.**

19 Celtic Bank is not a party to this action, or an officer, agent, or employee of any
20 party. Celtic is also not in “active concert or participation” with any party or party-
21 affiliate. As such, under Federal Rule of Civil Procedure 65(d)(2), Celtic Bank is not
22 personally bound by the Preliminary Injunction.

23 Nor can the Court enforce the Preliminary Injunction against Celtic Bank as an *in*
24 *rem* order with respect to property of the Receivership Estate, since Celtic Bank is not
25 merely holding the cash collateral on account for Defendants as depositors. To the
26 contrary, Celtic Bank is a secured creditor with a perfected interest in the cash collateral.
27 There has never been any determination by the Court that the cash collateral constitutes
28 property of the Receivership Estate. Unless and until a final determination is made as to

1 Celtic Bank's claim, there is no basis for a finding that Celtic Bank was bound by the
2 Preliminary Injunction.

3 Moreover, any requirement that Celtic Bank relinquish its perfected interest in the
4 cash collateral, which interest has priority over any interest of the Receiver, would
5 constitute a taking of Celtic Bank's property without due process and equal protection
6 under the laws. *See, e.g., Gross v. Lopez*, 419 US. 556, 577-79, 49 L.Ed.2d 25, 95 S.Ct.
7 729 (1975) The Constitution requires that property owners receive procedural due
8 process prior to the taking of their property interests.

9 **3. If the Court Determines It Has Jurisdiction to Issue an Order to Show**
10 **Cause, Celtic Bank is Entitled to an Evidentiary Hearing on the Issue of**
11 **whether the Cash Collateral Constitutes Property of the Receivership**
12 **Estate.**

13 A nonparty charged with contempt has the right to be heard in a meaningful
14 manner. A district court ordinarily should not impose contempt sanctions solely on the
15 basis of affidavits, particularly where the underlying facts are disputed and the affidavits
16 offered in support of the contempt are controverted, as they are here. *Peterson v.*
17 *Highland Music, Inc.*, 140 F.3d 1313, 1324 (9th Cir. 1998). Celtic Bank is therefore
18 entitled to conduct discovery, and to a full evidentiary hearing.

19 **4. The Receiver Has Not Met Its Burden of Showing that Celtic Bank**
20 **Violated the Preliminary Injunction by Clear and Convincing Evidence,**
21 **because It Has Failed to Establish that the Cash Collateral Constitutes**
22 **Property of the Receivership Estate.**

23 The Receiver must establish that Celtic Bank violated the Preliminary Injunction
24 by clear and convincing evidence. *In Re Dual-Deck Viedo Cassette Recorder Antitrust*
25 *Litigation*, 10 F.3d 693, 695 (9th Cir. 1993).

26 In order to meet its burden, the Receiver must therefore establish that the
27 Preliminary Injunction required Celtic Bank to turn over the cash collateral, which, in
28 turn, requires the Receiver to establish that the Cash Collateral constitutes property of

1 the Receivership Estate, and that the Receiver has the power to avoid Celtic Bank’s (and
2 the SBA’s) security interest in the subject cash collateral. *See SEC v. Colello*, 139 F.3d
3 64, 677 (9th Cir. 2011) The receiver seeking turnover of funds must establish that the
4 person/entity holding the funds has no legitimate property interest or other claim in the
5 funds.

6 Here, the Receiver has failed to adduce *any* evidence that the cash collateral
7 constitutes property of the Receivership Estate, or that Celtic Bank does not have a
8 legitimate property interest in the cash collateral.

9 **5. The Preliminary Injunction is Too Vague to be Enforceable as against**
10 **Celtic Bank.**

11 The Court may only find that Celtic Bank violated the Preliminary Injunction if
12 the order is sufficiently specific and definite. *See Gates v. Shinn*, 98 F.3d 463, 468 (9th
13 Cir. 1996) An injunction that does not clearly describe proscribed or required conduct is
14 not enforceable by contempt.

15 Here, the Preliminary Injunction fails to specifically define the property that is
16 part of the Receivership Estate, including whether the cash collateral falls within the
17 definition of “bank accounts . . . relating to the Suncor Receivership Entities.” It further
18 does not define “Receivership Property,” and the Preliminary Injunction does not grant
19 the Receiver the power to avoid valid and perfected security interests.

20 **6. Even if the Preliminary Injunction Required Celtic to Turn over the Cash**
21 **Collateral, Celtic Bank’s Inability to do so without Impairing Its**
22 **Interests, and Those of the SBA, Constitutes a Defense.**

23 Celtic Bank has a perfected security interest in the cash collateral which, to
24 remain perfected, requires that Celtic Bank maintain possession and control of the cash
25 collateral. Cal. Comm. Code §9104, 9314(a). Celtic Bank could not turn over the cash
26 collateral without potentially impairing both its interests in the cash collateral and those
27 of the Small Business Administration (“SBA”), who guaranteed the underlying loans in
28 reliance on the cash collateral.

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CONCLUSION

It is respectfully submitted that based on the foregoing, and on the opposition previously filed by Celtic Bank, Celtic Bank respectfully requests that the Court deny the Receiver's Ex Parte Application.

Dated: May 3, 2016

STRAGGAS DEAN, LLP

By: 

Eric D. Dean
Attorneys for Secured Creditor,
CELTIC BANK

PROOF OF SERVICE

I, Sarah Borghese, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 8911 Research Drive, Irvine, California 92618.

A true and correct copy of the following documents described below will be served in the manner indicated below:

SUPPLEMENTAL FILING OF THIRD PARTY SECURED CREDITOR, CELTIC BANK, RE EX PARTE APPLICATION OF RECEIVER, STEPHEN J. DONNELL, FOR ORDER TO SHOW CAUSE WHY CELTIC BANK SHOULD NOT BE HELD IN CIVIL CONTEMPT

TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”) – the above-described documents will be served by the Court via NEF. On May 3, 2016, I reviewed the CM/ECF Mailing Info For A Case Mail Notice List to receive NEF transmission at the email addresses indicated below:

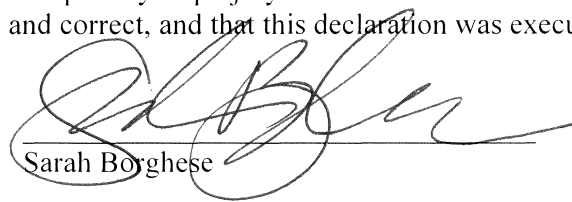
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Kenyon Harbison: kharbison@allenmatkins.com

SERVED BY U.S. MAIL OR OVERNIGHT (indicate method for each person or entity served): On _____, I served the following persons and/or entities in this case by placing a true and correct copy thereof in a sealed envelope(s) as indicated below. I am readily familiar with this firm’s practice of collection and processing correspondence for mailing. Under that practice it is deposited with the U.S. postal service on the same day in the ordinary course of business. I am aware that on motion for party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 (one) day after the date of deposit for mailing in the affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed at Irvine, California, on May 3, 2016.


Sarah Borghese