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 CELTIC BANK CORPORATION

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE
 COMMISSION,

Plaintiff,

vs.

ROBERT YANG, et al.,

Defendants.

and

YANROB'S MEDICAL, INC., et al.,

Relief Defendants.

CELTIC BANK CORPORATION, a Utah
 corporation,

Plaintiff-Intervenor,

vs.

SECURITIES AND EXCHANGE
 COMMISSION; STEPHEN J. DONELL, in
 his capacity as Receiver for the estates of
 Suncor Fontana, LLC, Suncor Hesperia,
 LLC and Suncor Care Lynwood, LLC,

Defendants-in-Intervention.

) Case No. 5:15-CV-02387-SVW
) (KKx)

) **SUPPLEMENTAL BRIEF OF**
) **CELTIC BANK RE**

) **(1) PROPOSED STIPULATION**
) **FOR JUDGMENT BETWEEN**
) **PLAINTIFF SECURITIES AND**
) **EXCHANGE COMMISSION**
) **AND RECEIVER STEPHEN J.**
) **DONELL ON BEHALF OF**
) **SUNCOR FONTANA, LLC;**

) **(2) REPLY TO OPPOSITIONS**
) **TO CELTIC BANK'S MOTION**
) **FOR LEAVE TO FILE**
) **COMPLAINT IN**
) **INTERVENTION;**

) **(3) RECEIVER'S**
) **SUPPLEMENTAL BRIEF IN**
) **SUPPORT OF APPLICATION**
) **FOR ORDER TO SHOW**
) **CAUSE RE: CONTEMPT**

) Judge: Hon. Stephen V. Wilson

) Date: Monday, June 6, 2016

) Time: 1:30 p.m.

) Courtroom: 6

I. INTRODUCTION

Following the filing of the Joint Reply Brief of Celtic Bank to the Oppositions to Motion for Leave to File a Complaint in Intervention [Docket No. 66] (“Celtic’s Joint Reply Brief”), Plaintiff Securities and Exchange Commission (“SEC”) and the Receiver it nominated for appointment, Stephen J. Donnell, have entered into a Stipulation for Entry of Judgment against Defendants Suncor Fontana, LLC, et al. [Docket No. 71] (the “Stipulation for Entry of Judgment”). This Stipulation for Judgment if granted would result in the current Preliminary Injunction [Docket No. 18] becoming a Permanent Injunction as it relates to Defendant, Suncor Fontana, LLC.

While Celtic Bank does not oppose a resolution of claims as to Defendant Suncor Fontana, LLC, it does oppose the entry of a judgment or order that in any manner arguably impacts the rights, defenses or remedies of Celtic Bank as to its claims to the \$2 million pledged as cash collateral especially considering that Celtic Bank justifiably relied on those pledged proceeds both in agreeing to initially make its loans and then not thereafter proceeding to foreclose the loan collateral.

In order to avoid any ambiguity or issues arising as to the impact of a judgment against Suncor Fontana, LLC, Celtic Bank respectfully requests that any Judgment that might be entered against that entity include a provision to the effect that:

“This judgment shall have no res judicata or collateral estoppel effect or otherwise limit the rights, interests, claims and defenses as asserted by Celtic Bank in the above-captioned Action.”¹

¹ While Celtic Bank rejects the position that a judgment against Suncor Fontana, LLC could impact Celtic Bank’s claims, rights or defenses, it nevertheless seeks clarity in the Judgment to avoid this issue arising in future proceedings. It should be noted that counsel for Celtic Bank asked counsel for the Receiver and SEC to agree to language to this effect, and counsel for SEC has rejected the proposal, thus necessitating this filing.

1 It is respectfully submitted that any adjudication of Celtic Bank's rights
2 without a full and fair evidentiary hearing would violate the due process
3 protections guaranteed to Celtic Bank under the Fifth Amendment of the United
4 States Constitution since the SEC and its designated Receiver have steadfastly
5 blocked Celtic Bank's efforts to directly participate in the Action so that its
6 security and collateral rights in the pledged cash collateral can be determined by
7 the Court.

8 II. STATEMENT OF FACTS

9 On May 27, 2016, after the filing of Celtic's Joint Reply Brief, SEC and the
10 Receiver filed the Stipulation for Entry of Judgment, which would enter judgment
11 by consent against Celtic Bank's Borrower, Suncor Fontana, LLC. The proposed
12 judgment would make this Court's prior order for "disgorgement" of funds a
13 judgment of this Court. However, the Stipulation for Entry of Judgment still does
14 not contain any procedure whereby Celtic Bank can adjudicate its right as a
15 secured creditor to a superior security interest in the \$2 million cash collateral.

16 Although Celtic Bank is not a party to the Stipulation for Entry of Judgment,
17 SEC and the Receiver appear to, once again, be colluding to destroy Celtic's
18 perfected security interest by agreeing to a final judgment that benefits the SEC
19 over other potential claimants, including Celtic Bank. Having removed any
20 practical path for the filing of a complaint in intervention, the Receiver has again
21 failed in its duties to provide for the fair disposition of assets. Only this Court can
22 provide a procedure to protect the property interest of Celtic Bank by providing for
23 an appropriate procedure whereby Celtic Bank is presented with a full and fair
24 hearing on the merits of a claim to a security interest in the \$2 million cash
25 collateral.

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III. LEGAL DISCUSSION

A. CELTIC BANK'S PERFECTED SECURITY INTEREST WILL BE SUPERIOR TO SEC'S JUDGMENT LIEN SO LONG AS CELTIC BANK IS NOT FORCED TO RELINQUISH POSSESSION OF THE \$2 MILLION CASH COLLATERAL.

As was more fully briefed in Celtic Bank's Opposition to Ex Parte Application for Order to Show Cause re: Contempt [Docket No. 52], a security interest in a deposit account is perfected by the secured party taking control of the collateral [*California Uniform Commercial Code* Section 9314(b)]. Moreover, pursuant to Section 9314(b), the security interest "remains perfected only while the secured party retains control." A perfected security interest has priority over a subsequently obtained judgment lien (See, K.N.C. Wholesale, Inc. v. AWMCO, Inc. (1976) 56 Cal.App.3d 315, 318).

Celtic Bank has offered to stipulate to any turnover of the funds that does not result in a violation of Section 9314(b); including the funds being provided to the Receiver to hold in trust for Celtic Bank's benefit. Such delivery would remain conditional only until Celtic Bank was provided a full and fair hearing on its claim of a security interest in the \$2 million cash collateral.

The Receiver has continually refused this practical remedy. However, now the Receiver seeks the additional leverage of agreeing to a confessed judgment, on which the SEC can then obtain a judgment lien against the \$2 million cash collateral.

In Raiton v. G & R Properties, 139 B.R. 931, 937 (9th Cir. BAP, 1992), a bankruptcy debtor brought a summary judgment motion seeking to avoid a security interest in stock certificates. Debtor had pledged the stock certificates to a creditor, and a third party bailee held the certificates, and eventually turned them over to the Internal Revenue Service pursuant to an enforcement levy on the Debtor's property. The Debtor argued that the delivery of the stock certificates to

1 the IRS was the equivalent of the Creditor having relinquished them back to the
2 Debtor, thereby destroying the previously perfected security interest. The Raiton
3 court disagreed, based on the IRS's complete independence from the Debtor or the
4 Creditor:

5 We conclude that once a debtor has parted with possession
6 of the collateral and the secured party, personally or
7 through an agent, obtains possession, perfection continues
8 until the debtor exerts or regains control over the
9 collateral. Here, there is no evidence that Debtor gained
10 such control. To hold that simple loss of possession by the
11 secured party per se invalidates the security interest would
12 invite uncertainty if not injustice: a secured creditor would
13 automatically lose its security interest which is dependent
14 on possession whenever collateral is misplaced,
15 converted, or wrongfully surrendered by the bailee to
16 whom the collateral is entrusted.

17 Here, the stock is in the hands of the IRS, presumably
18 claiming adversely to both Debtor and Appellant. It would
19 be a windfall and inequitable under these circumstances to
20 allow the Debtor or someone claiming through him, such
21 as the trustee, to profit from an adventitious event on
22 which no one, not even a bona fide purchaser or attaching
23 creditor, could have relied.

24 The Raiton decision underscores the unique dilemma posed by the Receiver's
25 Stipulation for Entry of Judgment. On the one hand, the proposed compulsory
26 turnover of the \$2 million cash collateral by Celtic Bank to the Receiver is the
27 equivalent of the compulsory turnover to the IRS described in Raiton. However, in
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the present matter, the Receiver purports to act on behalf of Celtic Bank's Debtor, Suncor Fontana, LLC, having the power even to confess to judgment on its behalf.

The Receiver's transparent agenda is to obtain turnover of the funds, permit the SEC to obtain a judgment lien against the funds, and then claim that the SEC holds a superior interest in the funds by claiming Celtic Bank's security interest was destroyed by the turnover of the funds. Such a result would clearly offend even the most fundamental notions of due process.

B. THE STIPULATED JUDGMENTS IMPERMISSIBLY SEEK TO BIND CELTIC BANK THROUGH IMPOSED FINDINGS OF FACT THAT VIOLATE F.R.Civ.P. RULE 52.

The proposed consent to judgment against Celtic Bank's borrower, Suncor Fontana, LLC, indicates that the parties are waiving any findings of fact under Rule 52 of the Federal Rules of Civil Procedure [Docket No. 71-2, Page 3, lines 7-8]. However, the consent to judgment also provides in relevant part as follows:

Defendant further agrees that in connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: . . .

(c) solely for purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court . . . [Docket No. 71-2, Page 2, line 23 through Page 3, line 1].

The consent to judgment also provides at Page 6, lines 6 through 9 as follows:

16. Defendant agrees that the Preliminary Injunction, Order Appointing Receiver, Freezing Assets, and Providing Other Ancillary Relief entered by the Court on December 12, 2015, shall remain in full force and effect as to Defendant following entry of the Judgment.

1 While the consent to judgment purports to affect only the Defendant, it also
 2 seeks to make the December 12, 2015, order a judgment of this Court. That is the
 3 very order under which the Receiver claims the right to demand that Celtic Bank
 4 turnover the \$2 million cash collateral in which Celtic Bank has a security interest;
 5 and the same order that is the subject of the Receiver's contempt motion against
 6 Celtic Bank.

7 In sum, the Receiver seeks to permanently bind Celtic Bank to the
 8 preliminary injunction without its consent; and it seeks to improperly impose
 9 findings of fact on Celtic Bank that do not comport with F.R.Civ.P. Rule 52, and
 10 without due process of law.

11 Pursuant to F.R.Civ.P. Rule 52(a)(3), no findings of fact are required when
 12 ruling on a motion. Moreover, no findings of fact are required for a judgment
 13 entered by stipulation [Bowater North America Corp. v. Murray Machinery, Inc.
 14 (6th Cir., 1985) 773 F.2d 71, 77)]. However, when parties stipulate to establish
 15 evidentiary facts, the Court must itself find ultimate facts upon which its
 16 conclusions of law and judgment are based [Platt v. United States (10th Cir., 1947)
 17 163 F.2d 165, 168)].

18 The collusive Stipulation for Entry of Judgment entered by the parties
 19 cannot be permitted to affect Celtic Bank's rights as Celtic Bank has not been
 20 given fair notice and an opportunity to be heard. The Court should include in the
 21 proposed judgment to be entered on the Stipulation for Entry of Judgment clear
 22 language that the rights of Celtic Bank and other third parties are in no way
 23 impacted by the entry of the proposed judgment by consent.

24 **C. REGARDLESS OF WHETHER THE MOTION TO INTERVENE**
 25 **HAS BEEN MOOTED BY THE STIPULATION FOR ENTRY OF**
 26 **JUDGMENT, CELTIC BANK IS ENTITLED TO DUE PROCESS**
PROTECTION.

27 Due process requires adequate notice and procedures to contest the
 28 deprivation of property rights [Mathews v. Eldridge, 424 U.S. 319, 332-33, 96 S.

1 Ct. 893, 47 L. Ed. 2d 18 (1976)]. The fundamental requirement of due process is
 2 that a party shall be afforded the opportunity to be heard "at a meaningful time and
 3 in a meaningful manner" (Mathews, 424 U.S. at 333). Additionally, the "right of a
 4 secured creditor to the value of its collateral is a property right protected by the
 5 Fifth Amendment" [United States v. Ritchie Special Credit Invs., Ltd. 620 F.3d
 6 824, 835, quoting from, In re Townley, 256 B.R. 697, 700 (Bankr. D.N.J. 2000)].

7 As is more fully set forth in Celtic's Joint Reply Brief, this court has
 8 jurisdiction to institute reasonable procedures to effectuate the fundamental
 9 purposes of a Receivership; including procedures to preserve receivership assets,
 10 administer receivership property, and provide for the equitable distribution of
 11 property [SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986)]. Given the
 12 Receiver's strident efforts to avoid any procedure that might result in Celtic Bank
 13 having a fair hearing on its claim of a security interest in the \$2 million cash
 14 collateral, due process can only be satisfied by this Court taking action to:

15 (1) Preserve the \$2 million in cash collateral by requiring the funds to be
 16 placed in a trust account, pursuant to an Order of this Court expressly stating that
 17 such action will not be deemed to destroy or otherwise affect any existing security
 18 interest pending the adjudication of Celtic Bank's claims;

19 (2) Set the issue of Celtic Bank's claim of a priority security interest for
 20 trial, and order the parties to complete a Rule 26 conference to set appropriate
 21 discovery dates and other pre-trial dates.

22 IV. CONCLUSION

23 The Receiver has expended enormous resources attempting to avoid a
 24 simple hearing on Celtic Bank's claim of a superior security interest in the \$2
 25 million cash collateral. Clearly the Receiver would have met his responsibilities
 26 as a non-adversarial representative of the Court by cooperating with the setting of
 27 a hearing. However, it is even more clear that the Receiver will never do so, and
 28 will continue to avoid the presentation of evidence to this Court. The Receiver's

1 recent actions demonstrate that the Receiver hopes to destroy Celtic Bank's
2 security interest before a hearing can be held. Celtic Bank respectfully requests
3 that the Court order the funds to be held in trust by the Receiver, that the Court's
4 order expressly state that such action will not be deemed to destroy or otherwise
5 affect any existing security interest pending the adjudication of Celtic Bank's
6 claims, and that an appropriate procedure be adopted for the full and fair hearing
7 of Celtic Bank's claims.

8
9 Dated: June 1, 2016

STRAGGAS DEAN, LLP

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11 By: /s/ George D. Straggas
12 George D. Straggas, Attorneys for
13 Proposed Plaintiff-Intervenor, CELTIC
14 BANK CORPORATION
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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 BRIEF OF CELTIC BANK RE (1) PROPOSED STIPULATION FOR JUDGMENT BETWEEN PLAINTIFF SECURITIES AND EXCHANGE COMMISSION AND RECEIVER STEPHEN J. DONELL ON BEHALF OF SUNCOR FONTANA, LLC; (2) REPLY TO OPPOSITION TO CELTIC BANK'S MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; (3) RECEIVER'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE RE: 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 June 1, 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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☐ **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 June 1, 2016.


Sarah Borghese