

1 DAVID R. ZARO (BAR NO. 124334)
 2 JOSHUA A. DEL CASTILLO (BAR NO. 239015)
 3 MELISSA K. ZONNE (BAR NO. 301581)
 4 ALLEN MATKINS LECK GAMBLE
 5 MALLORY & NATSIS LLP
 6 865 South Figueroa Street, Suite 2800
 7 Los Angeles, California 90017-2543
 8 Phone: (213) 622-5555
 9 Fax: (213) 620-8816
 10 E-Mail: dzaro@allenmatkins.com
 11 jdelcastillo@allenmatkins.com
 12 mzonne@allenmatkins.com

13 Attorneys for Receiver
 14 STEPHEN J. DONELL

15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA

17 SECURITIES AND EXCHANGE
 18 COMMISSION,

19 Plaintiff,

20 v.

21 ROBERT YANG; et al.,

22 Defendants.

23 and

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

25 Relief Defendants.

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

SPECIFIC OBJECTION OF RECEIVER,
 STEPHEN J. DONELL, TO PROOF OF
 CLAIM OF CELTIC BANK

[Declaration of Stephen J. Donell
 submitted concurrently herewith]

Date: November 13, 2017
 Time: 1:30 p.m.
 Ctrm: 10A
 Judge: Hon. Stephen V. Wilson

26 Stephen J. Donell (the "Receiver"), the Court-appointed receiver for
 27 Defendants Suncor Fontana, LLC, Suncor Hesperia, LLC, Suncor Care Lynwood,
 28 LLC, and their respective subsidiaries and affiliates (collectively, the "Receivership
 Entities"), hereby submits the following Specific Objection to the Proof of Claim of
 Celtic Bank Corporation ("Celtic Bank"), Claim No. 183, (the "Celtic Claim"),
 arising out of two loans (the "Loans") made by Celtic Bank to the Receivership
 Entities. As reflected in prior submissions, the Loans were secured by the real

1 property and improvements commonly known as 7227 Oleander Avenue, Fontana,
2 California (the "Fontana Project").

3 **I. INTRODUCTION AND SUMMARY OF OBJECTION.**

4 The Receiver objects to the Celtic Claim on the grounds that the Celtic Claim
5 is barred by California's anti-deficiency laws. Moreover, Celtic Bank's claimed
6 security interest in the \$2 million turned over to the Receiver on order of this Court
7 (plus accrued interest of at least \$34,897.66, not turned over) (collectively, the
8 "Deposits"), which funds were previously on deposit with Celtic Bank in accounts
9 owned by the Receivership Entities and commonly identified as Account
10 No. 11900821 and Account No. 13002962 (collectively, the "Accounts"), has been
11 extinguished. Absent an existing security interest in the Deposits, Celtic Bank has
12 no independent claim against the receivership estate. Indeed, even assuming that
13 Celtic Bank's claimed security interest survived the Receiver's appointment, his
14 request for the turnover of the Deposits, and Celtic Bank's nonjudicial foreclosure of
15 the Fontana Project, the Receiver's turnover demand (and the attendant turnover of
16 the Deposits, which should have occurred at the time of the Receiver's initial
17 demand) trumps that interest.

18 Finally, the Receiver disputes the stated amount of Celtic Bank's claim.

19 Celtic Bank's Claim is a "deficiency" claim reflecting the alleged balance due
20 on the Loans following Celtic Bank's consummation of a non-judicial foreclosure
21 sale on the Fontana Property. Under controlling California law, Celtic Bank's
22 deficiency claim is barred based on Celtic Bank's election to pursue a *nonjudicial*
23 foreclosure on its real property security.

24 Although not stated in the Celtic Claim, the Receiver believes that Celtic
25 Bank contends that it has an independent right to recover the amount of the
26 deficiency based on its alleged, pre-receivership security interest in the Accounts
27 and the Deposits. While Celtic may have had a security interest in the Accounts
28 prior to the commencement of the receivership, Celtic's security interest along with

1 any right to enforce the security interest against the Deposits, was extinguished
2 upon: (1) the entry of this Court's December 11, 2015 Preliminary Injunction, Order
3 Appointing Receiver, Freezing Assets, and Providing for Other Ancillary Relief (the
4 "Appointment Order") (Dkt. No. 18); (2), the Receiver's formal, March 4, 2016
5 demand for the turnover of the Deposits; or (3) at the latest, the date on which Celtic
6 Bank turned over \$2 million of the Deposits to the Receiver in partial compliance
7 with an order from this Court. Put simply, having lost its security interest in the
8 Deposits, Celtic Bank lost its sole basis to overcome the bar to its deficiency claim
9 under California's strict anti-deficiency laws.

10 Even assuming, *arguendo*, that Celtic Bank had properly perfected its security
11 interest in the Accounts or the Deposits during the pre-receivership period, its
12 failure to timely exercise its right to foreclose on or offset against the Deposits,
13 *prior to entry of the Appointment Order*, resulted in the loss of Celtic Bank's alleged
14 security interest. Indeed, even if the Court were to find that Celtic Bank maintained
15 some interest in the Accounts after the Appointment Order, its interest was
16 extinguished as soon as the Receiver demanded the turnover of the Deposits in
17 accordance with the clear terms of the order or, again, and at the latest, when Celtic
18 Bank turned over \$2 million to the Receiver.

19 Having sat on its lien rights and foregone numerous pre-receivership
20 opportunities to foreclose on or offset its alleged security interest in the Deposits,
21 Celtic Bank was left with only a security interest in the Fontana Project after the
22 Appointment Order was entered, at which point the Deposits became the Receiver's
23 property. Without a security interest, Celtic Bank has no claim to the Deposits, nor
24 any independent claim against the Receivership Entities. Even had the security
25 interest survived, the Receiver's appointment and his subsequent demand for the
26 turnover of the Deposits trumps Celtic Bank's rights against the subject funds.

27 Based on the foregoing, the Receiver requests that the Court deny the Celtic
28 Claim, in its entirety.

1 **II. RELEVANT FACTUAL BACKGROUND.**

2 **A. Celtic Bank's Loan Documents, Alleged Security Interests, And Its**
3 **Borrower's Defaults.**

4 On or around February 17, 2012, Celtic Bank made two (2) loans in the
5 amount of \$2.5 million to the Receivership Entities HealthPro Capital Partners, LLC
6 and Suncor Care, Inc. (collectively, the "Borrower") (again, the "Loans"). (See, e.g.,
7 Dkt. No. 52.) The Loans were secured by a deed of trust on the Fontana Property as
8 well as a security agreement and an assignment of deposit account referencing an
9 Account (number xxx2962) in which \$1,000,000 was to be deposited.¹ (See, e.g.,
10 Dkt. Nos. 52, 58-1.) As both the bank maintaining the Account and holder of a
11 security interest during the pre-receivership period, Celtic Bank could claim a
12 security interest in the Deposits in the specified Account so long as the funds were
13 in the account and owned by the Borrower. In other words, as long as the Borrower
14 owned and did not withdraw the money in the Accounts, Celtic Bank arguably had a
15 security interest in the money. Once the money was withdrawn or no longer owned
16 and controlled by the Borrower, Celtic Bank's security interest in the Deposits was
17 extinguished.

18 Borrower defaulted on the Loans on several occasions in 2013 and 2014. As
19 a result, Celtic Bank insisted upon the negotiation and execution of a Continuation
20 Agreement, dated June 9, 2014, between Celtic Bank and Borrower. (See, e.g., Dkt.
21 No. 52-10.) Based on this Continuation Agreement, Borrower deposited additional
22 funds at Celtic Bank, including another \$1 million into the second of the Accounts
23 (number xxxx0821). The Continuation Agreement had a myriad of conditions,
24 obligations and requirements with regard to, among other things, further deposits,
25
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27 _____
28 ¹ Celtic Bank has claimed, and provided some documents to suggest that, a
security interest in the second Account, also initiated with a balance of
\$1 million, was later established.

1 use of loan proceeds, and Borrower's and the Receivership Entities' further
2 investment in the Fontana Property. (Id.)

3 The Borrower and Receivership Entities promptly defaulted on the
4 Continuation Agreement. The records reflect that Celtic Bank was fully aware of
5 these defaults. Notwithstanding Celtic's knowledge of the Borrower's multiple
6 defaults with regard to the Loans and Continuation Agreement, Celtic Bank did not
7 exercise its right to foreclose on the Fontana Property, offset against the Deposits in
8 the Accounts, or otherwise take any action to pursue its default remedies under the
9 applicable loan documents. Instead, Celtic Bank actively pushed for further
10 construction work at the Fontana Property and the further release and expenditure of
11 the proceeds from the Loans. (See concurrently filed Declaration of Stephen J.
12 Donell ["Donell Decl." ¶ 2.) At the time Celtic Bank was releasing additional loan
13 proceeds and increasing the balances due on the Loans, Celtic Bank already had
14 knowledge of the Borrower's breach of the loan documents, including, at least, the
15 relevant the Construction Loan Agreements and the Continuation Agreement.
16 Moreover, Celtic Bank knew the construction project at the Fontana Property was
17 woefully underfunded and that Borrower was involved in litigation with its general
18 contractor. In other words, throughout 2014 and 2015, Celtic Bank made the
19 deliberate business decision, with access to all relevant information, to sit on its
20 contractual rights to declare a default, take the Deposits, and foreclose on the
21 Fontana Property. By the submission of its claim, it now seeks recompense for its
22 own failure to timely act to mitigate its losses in the pre-receivership period.

23 **B. The Receiver's Appointment And The Turnover Of The Deposits.**

24 The Receiver was appointed on December 11, 2015, pursuant to the
25 Appointment Order. (See Dkt. No. 18.) Section V of the Appointment Order
26 immediately vested the Receiver with exclusive authority and control over the assets
27 of the Receivership Entities ("Receivership Assets") including the Deposits and
28 Accounts. Id. The Appointment Order directed "[a]ll persons and entities having

1 control, custody or possession of any Receivership [Assets] ... to turn such property
 2 over to the Receiver." (Id.) Section V.F.1. of the Appointment Order further
 3 prohibits third parties from "taking any action ... without the express written
 4 agreement of the Receiver[]" which would ... [i]nterfere with the Receiver's efforts
 5 to take control, possession, or management of any Receivership [Assets]" including
 6 by resorting to "self-help ... or taking possession of ... any Receivership [Assets.]"

7 Instead of complying with its obligation to turn over the Deposits to the
 8 Receiver pursuant to Section V.F.1., on or around December 14, 2015, Celtic Bank
 9 provided the Receiver with a Certified Statement confirming, among other things,
 10 that it held just over \$2 million in Receivership Assets in the Accounts.² (See
 11 concurrently submitted Declaration of Stephen J. Donell ["Donell Decl."] ¶ 3,
 12 Ex. 1).

13 After reviewing the records obtained from the Plaintiff Securities and
 14 Exchange Commission (the "Commission"), individual Defendants Yang and Kano
 15 (the "Defendants"), and others, the Receiver confirmed that the Deposits in the
 16 Accounts were owned by a Receivership Entity, Health Pro Capital Partners, LLC
 17 ("HealthPro"). HealthPro is an affiliate of the Receivership Entities and is therefore,
 18 a Receivership Entity itself.³ The Receiver also traced the Deposits in the Accounts
 19

20 ² Section V.F.3.c of the Appointment Order required any banks in "possession,
 21 custody or control of any ... funds held by, in the name of, or for the benefit of"
 22 the Receivership Entities to file a certified statement accounting for such
 23 Receivership Assets. Celtic's submission therefore reflects an admission that the
 24 funds in issue are Receivership Assets.

25 ³ Status as an "affiliate", in securities cases, is not determined by any single factor,
 26 but Courts generally consider the nature of the relationship between entities,
 27 degree of control and influence (including common control by another company
 28 or individual), and the financial interests between the entities and individuals
 involved. See SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1087 (9th
 Cir. 2010); SEC v. Burns, 816 F.2d 471, 475 (9th Cir. 1987). As defined under
 Rule 144 of the Securities Act of 1933, an affiliate is "a person that directly or
 indirectly through one or more intermediaries, controls, or is controlled by, or is
 under common control with, such issuer." 17 C.F.R. § 230.144(a)(1). Similarly,
 "Rule 12b-2 of S.E.C. Regulation 12B, which governs the registration and
 reporting of securities, defines an 'affiliate' as a 'person that directly, or indirectly
 through one or more intermediaries, controls, or is controlled by, or is under
 common control with, the person specified.'" In re Motorola Securities

1 and found that they originated exclusively with two (2) sets of investors in Suncor
2 Fontana, LLC and HealthPro, in connection with the proposed development of the
3 Fontana Property. (See Donell Decl. ¶ 4.)

4 Shortly after his appointment, the Receiver provided Celtic Bank notice and a
5 copy of the Appointment Order and commenced discussions with Celtic regarding
6 the Fontana Property. (Id. at ¶ 5.) The initial discussions between the Receiver and
7 Celtic Bank related in part to the history and status of the Loans, the condition of
8 and construction at the Fontana Property, and outstanding contractor draw requests
9 in connection with the Loans. (Id.) During his discussions with Celtic Bank, the
10 Receiver specifically advised Celtic Bank that the \$2 million on deposit in the
11 Accounts might be determined to be a receivership asset and that, if that
12 determination were made, the funds would be subject to turnover pursuant to the
13 Appointment Order. (Id.) The Receiver also told Celtic Bank that he would make a
14 turnover request at such time as he confirmed that the Deposits were derived from
15 investors and attributable to the Receivership Entities. (Id.) As it did during the
16 pre-receivership period, Celtic Bank initially encouraged the Receiver to accept
17 further draws on the Loans and to pursue the Fontana Property.

18 In or around late February, 2016, the Receiver completed his review of the
19 documents and concluded that the Deposits were owned by Receivership Entities
20 and the source of the Deposits was exclusively investor funds. (Id. at ¶ 6).
21 Specifically, the Receiver was able to account for the funds from investors to Celtic,
22 as reflected in the flow-chart on the following page:

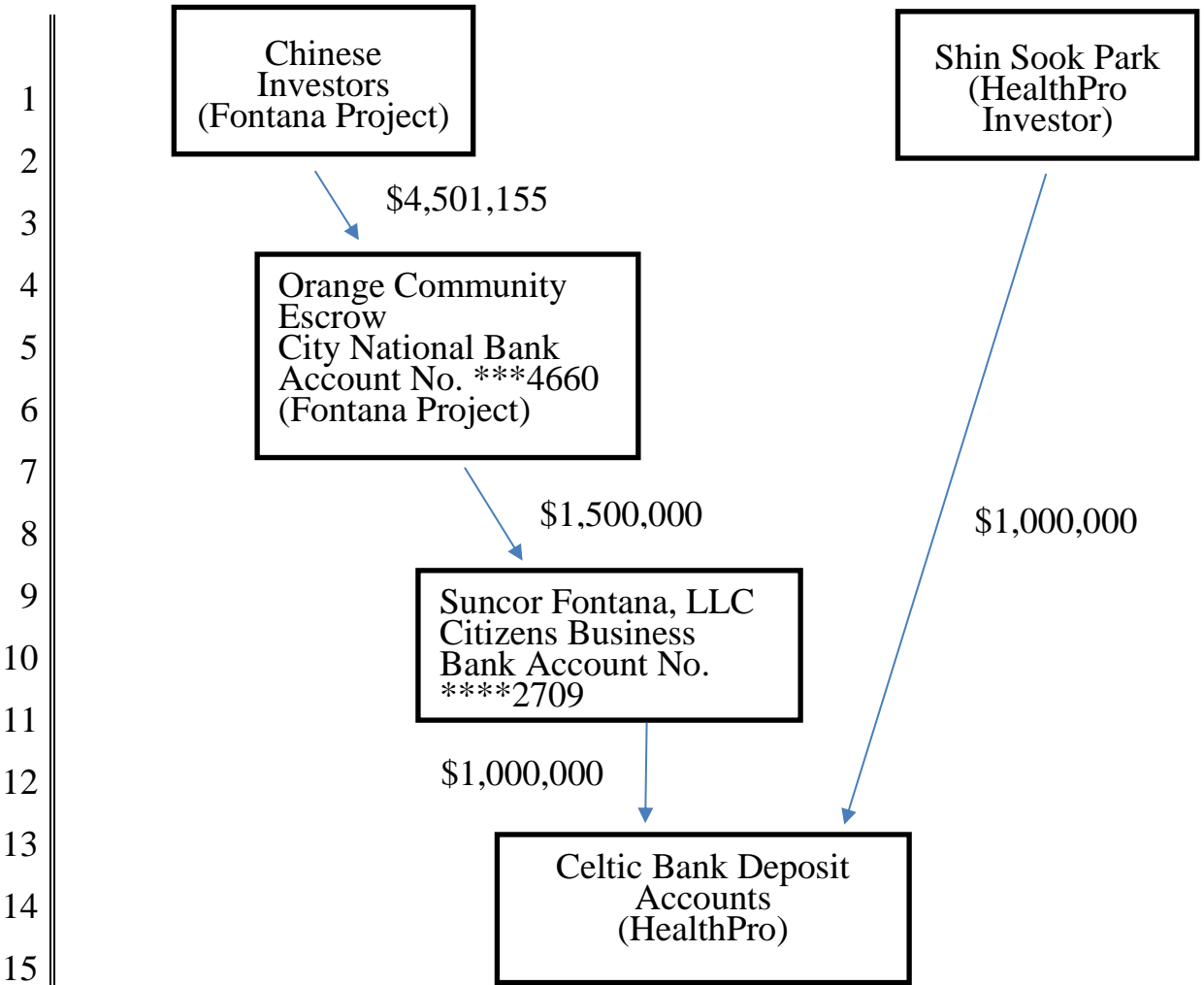
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27 Litigation, 644 F.3d 511, 519-520 (7th Cir. 2011). Here, it is undisputed that
28 Suncor Fontana, LLC and HealthPro are commonly controlled and were
established by Defendants Yang and Kano with an identify of purpose and
interest.



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(Id.)

The Receiver demanded that Celtic Bank turn over the Deposits in March 2016 in accordance with the terms of the Appointment Order. (See Dkt. Nos. 48, 50.) Celtic Bank refused to turn over the Deposits. Instead, Celtic Bank claimed, among other things, that it required input from the Small Business Administration, the guarantor on the Loans, and criticized the Receiver's administration of the Fontana Project. (Id.)

Thereafter, the Receiver filed the Ex Parte Application of Receiver Steven J. Donell, for Order to Show Cause Why Celtic Bank Should not be Held in Contempt (the "OSC Application") for Celtic Bank's failure to turn over the Deposits to Receiver. (See Dkt. No. 48.) The Court then ordered Celtic Bank to turn over the Deposits to the Receiver, who would thereafter retain possession of them pending

1 the claims process. (Dkt. 83.) Celtic Bank turned over \$2 million from the Deposits
 2 to the Receiver, but did not turn over the accrued interest reflected in its previously
 3 produced Certified Statement. (Donell Decl. ¶ 7.) The Receiver currently holds the
 4 Deposits in accordance with the Court's instructions.

5 **C. Celtic Forecloses Upon Its Deed of Trust.**

6 After the Receiver determined that the Fontana Property was worth less than
 7 the amount owed on the Loans, the Receiver advised Celtic Bank that he would not
 8 object to Celtic's exercising its right to foreclose on the Fontana Property pursuant to
 9 Celtic Bank's deed of trust. To that end, the Receiver moved the Court for an order
 10 authorizing the abandonment of the Fontana Project to a foreclosure by Celtic Bank.
 11 (Dkt. Nos. 115-117.). The Court subsequently granted the Receiver's motion. (See
 12 e.g., Dkt. No. 133.)

13 Instead of pursuing a judicial foreclosure sale and preserving its right to
 14 deficiency claim against the Receivership Entities, Celtic Bank elected to pursue a
 15 non-judicial foreclosure sale of the Fontana Property. On August 24, 2016, Celtic
 16 recorded a notice of default with regard to the Fontana Property. (Donell Decl. ¶ 8,
 17 Ex. 2.) On December 16, 2016, the foreclosure trustee concluded the trustee's
 18 *non-judicial* foreclosure sale ("Trustee's Sale"), vesting ownership of the Fontana
 19 Property in Celtic.

20 **III. APPLICABLE LEGAL STANDARDS.**

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

1 distribution of assets to be undertaken equitably and fairly. SEC v. Elliot, 953 F.2d
2 1560, 1569 (11th Cir. 1992).

3 Moreover, district courts have broad power to determine the appropriate
4 method of administering a receivership estate. As the Ninth Circuit has explained:

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

10 SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005); see also
11 SEC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court
12 affords 'broad deference to the [district] court's supervisory role and 'we generally
13 uphold reasonable procedures instituted by the district court that serve th[e] purpose'
14 of orderly and efficient administration of the receivership for the benefit of
15 creditors.").

16 In the context of receivership and similar proceedings, it is a claimant's
17 burden to establish a valid claims against a receivership estate. See Lundell v.
18 Anchor Contr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000); Revere Copper
19 & Brass, Inc. v. Adriance Machine Works, Inc., 76 F.2d 876, 878 (2d Cir. 1935).
20 Accordingly, claims (or portions thereof) submitted without support for the amount
21 claimed, and which cannot be reconciled with the Receiver's records and analysis,
22 should be denied.

23 Finally, in the estate administration context, courts are deferential to the
24 business judgment of bankruptcy trustees, receivers, and similar estate custodians.
25 See, e.g., Bennett v. Williams, 892 F.2d 822, 824 (9th Cir. 1989) ("[W]e are
26 deferential to the business management decisions of a bankruptcy trustee.");
27 Southwestern Media, Inc. v. Rau, 708 F.2d 419, 425 (9th Cir. 1983) ("The decision
28 concerning the form of ... [estate administration] ... rested with the business

1 judgment of the trustee."); In re Thinking Machines Corp., 182 B.R. 365, 368 (D.
2 Mass. 1995) ("The application of the business judgment rule ... and the high degree
3 of deference usually afforded purely economic decisions of trustees, makes court
4 refusal unlikely.") (rev'd on other grounds, In re Thinking Machines Corp., 67 F.3d
5 1021 (1st Cir. 1995)).

6 **IV. ARGUMENT.**

7 **A. Absent Any Security Interest, Celtic's Claim Is Barred As An**
8 **Unsecured Deficiency Claim.**

9 1. Celtic's Security Interest in the Deposits Was Extinguished Upon
10 Entry of the Appointment Order and Turnover of the Deposits.

11 The Appointment Order is clear: "All persons and entities having control,
12 custody or possession of any Receivership Property [Assets] are hereby directed to
13 turn such property over to the Receiver." Section V.F.1. Further, as noted above,
14 Section V.F.1. of the Appointment Order bars any entity from engaging in self-help
15 or interference with the Receiver's efforts to recover Receivership Assets.

16 Compliance with the Appointment Order was not voluntary and the Deposits
17 are indisputably Receivership property or assets. As such, upon the entry of the
18 Appointment Order, three things occurred: First, the Receiver was vested with
19 immediate and exclusive possession and control of the Deposits and the Accounts.
20 Second, the Accounts were frozen. Third, Celtic Bank was required to turn over the
21 Deposits to the Receiver. (Id.) In other words, entry of the Appointment Order
22 effectuated an immediate withdrawal of the Deposits from the Accounts by the
23 Receiver.

24 Pursuant to Uniform Commercial Code ("UCC"), 9-104(a) and 9-312(b)(1),
25 Celtic Bank held a security interest in the Deposits only so long as it had control
26 over and physical possession of them. The moment that control and possession was
27 eliminated, Celtic Bank's security interest in the Accounts and the Deposits was
28

1 vitiated. Celtic lost its security interest. See UCC 9-332(a), (b); Clark, The Law of
2 Secured Transactions, Section 1.08 [13][b], pp. 1-291.

3 Celtic Bank's initial refusal to turn over the Deposits to the Receiver did not
4 abrogate or diminish the impact of the Appointment Order. In fact, by operation of
5 law, the Appointment Order had the effect of dispossessing Celtic Bank of the
6 Deposits, making them an asset of the receivership estate. Even if the Court were to
7 find that the entry of the Appointment Order did not have the immediate effect of a
8 withdrawal by the Receiver (loss of ownership or control by the pre-receivership
9 entities in possession of those funds), there can be no doubt that the Receiver's
10 turnover demand was tantamount to a withdrawal, resulting in the extinguishment of
11 Celtic Bank's claimed security interest.

12 In simplest terms, Celtic Bank lost its security interest because the Receiver
13 became the "customer" on the Accounts following entry of the Appointment Order.
14 The Receiver then demanded, and ultimately received, the Deposits. Upon the
15 demand for withdrawal of the Deposits, Celtic Bank was obligated to immediately
16 turn over the money. At that moment, Celtic Bank lost whatever secured interest it
17 may have held when the Deposits were maintained within the Accounts.

18 Celtic Bank may assert that the foregoing reflects an unfair impact upon their
19 interests, however, such assertions must be considered in light of Celtic Bank's pre-
20 receivership actions. Celtic Bank sat on its rights for perhaps years but certainly, at
21 least, the six (6) months prior to the Appointment Order. During that time, Celtic
22 Bank could have declared a default at any time and foreclosed on or offset against
23 the Deposits or foreclosed on the Accounts. Taking the Deposits would have been
24 as simple as Celtic Bank transferring the Deposits from the Accounts to an account
25 controlled by Celtic. Celtic Bank's pre-receivership failure to declare a default and
26 pursue its security interest reflects nothing more than a calculated risk or bet that by
27 continuing to fund construction at the Fontana Property, the value of Celtic Bank's
28 real property collateral would increase prior to its foreclosure.

1 Even after the Receiver was appointed, Celtic Bank encouraged the Receiver
2 to continue with the improvements at the Fontana Property. Celtic Bank was so
3 convincing that the Receiver briefly agreed to do so, based in substantial part on
4 Celtic Bank's and Defendants Yang and Kano reaffirming the viability of the
5 project. Of course, the Receiver soon determined that the Fontana Project was
6 entirely untenable, shut it down, and demanded that Celtic Bank turn over the
7 Deposits.

8 Celtic Bank made a calculated business decision to not pursue its contractual
9 remedies in the pre-receivership period. Instead, it made the business decision to
10 forbear from foreclosing on its real and personal property collateral. As such, Celtic
11 has no claim in equity to the payment of its claim.

12 2. Even if Celtic Bank's Security Interest Survived the Receiver's
13 Appointment and his Withdrawal of the Deposits, it Cannot
14 Attach to the Deposits.

15 The law is clear, where a creditor has a secured interest in a deposit account
16 or similar collateral, but a withdrawal of funds from that account is effectuated
17 *before* the secured creditor acts – even where its borrower is in default – the
18 withdrawal trumps the security interest. As at least one circuit court has noted, a
19 bank cannot "refuse to exercise its rights under [a] security agreement, thereby
20 maintaining the [debtor] as a going concern, while it impairs the status of other
21 creditors ... [T]o do so would so fly in the face of all of Article 9, which is premised
22 upon the debtor's ability to exercise rights in the property." Frierson v. United Farm
23 Agency, Inc., 868 F.2d 302, 305 (8th Cir. 1989); see also Am. Home Assurance Co.
24 v. Weaver Aggregate Transp., Inc., 84 F.Supp.3d 1314, 1318, 1327 (M.D. Fl. 2015)
25 (to "establish its priority" and thwart a withdrawal from a deposit account, a bank
26 "must show that it declared the loan in default *and* took affirmative steps thereafter
27 to enforce its right" and the "mere declaration of a default in the absence of other
28 remedial action ... does not entitle the secured party to take possession of the

1 collateral") (internal citations and quotation marks omitted, and emphasis added);
2 S.E.I.U. Local No. 4 Pension Fund v. Pinnacle Health Care of Berwyn LLC, 560
3 F.Supp.2d 647, 651 (Nd. Ill. 2008) (rejecting secured lender's contention that its
4 security interest prevailed over order releasing funds from secured account to
5 unsecured creditor, where lender failed to timely enforce security interest, despite
6 borrower default).

7 The same is true under California's application of the UCC. See, e.g., Orix
8 Fin. Servs., Inc. v. Kovacs, 167 Cal.App.4th 242, 241-51 (2008) (holding that
9 unsecured creditor's satisfaction of judgment from debtor's bank account superseded
10 secured creditors rights against same, and specifically noting that "any suggestion
11 that the rights of a secured creditor cannot be compromised by junior creditors is not
12 persuasive.").

13 Here, notwithstanding Borrower's pre-receivership defaults, Celtic Bank took
14 no action in the pre-receivership period to enforce its security interest, including via
15 a setoff against the Accounts. The Receiver's appointment, and the turnover
16 requirements of the Appointment Order, paired with the Receiver's specific turnover
17 demand, effectuated a *de facto* withdrawal of the Deposits (and certainly, the
18 physical turnover of the funds reflected a relinquishing of Celtic Bank's possession
19 and control). Accordingly, even assuming, *arguendo*, that Celtic Bank's security
20 interest survived, there would be no Deposits against which its security interest
21 could attach.

22 3. The Celtic Claim is Barred as an Unsecured Deficiency Claim.

23 A deficiency judgment is a claim or judgment against a borrower, which the
24 lender may obtain when the proceeds of a foreclosure sale are less than the amount
25 owing on the loan secured by the foreclosed property. California Mortgages, Deeds
26 of Trust, and Foreclosure Litigation (4th Ed. Cal. CEB 2015), Section 3.86 at 3–63.
27 In order to obtain a deficiency judgment against a borrower, the "anti-deficiency"
28 rule of Cal. Code Civ. P. ("CCP") § 580d requires that a lender foreclose by way of

1 a judicial foreclosure rather than a trustee's sale under the power of sale provision
2 contained in the lender's deed of trust. In other words, CCP § 580d bars deficiency
3 judgments and declares that "no deficiency shall be owed or collected" following
4 non-judicial foreclosure sales. California Mortgages, Deeds of Trust, and
5 Foreclosure Litigation (4th Ed. Cal. CEB 2015), Section 5.5 at 5–7. Only in the
6 event of a judicial foreclosure is a lender permitted to pursue a deficiency judgment
7 against a borrower, and then only to the extent that the "fair value" of the real
8 property fails to satisfy the amount of the debt secured by such real property. See
9 CCP § 580a, § 580d.

10 In this case, Celtic Bank made the Loans to the Borrower pursuant to a note
11 secured by a deed of trust on the Fontana Property. After the Receiver was
12 appointed, Celtic Bank availed itself of the Court-ordered abandonment of the
13 Fontana Project in order to pursue a foreclosure sale pursuant to its deed of trust. It
14 made the business decision to proceed with a non-judicial foreclosure sale and
15 concluded such trustee's sale on December 22, 2016.

16 According to the Celtic Claim, Celtic Bank made a credit bid of \$1,200,000 at
17 the trustee's sale and purchased the Fontana Project in satisfaction of its debt. The
18 balance due to Celtic Bank on the Loans reflects the very deficiency barred by the
19 CCP. Celtic Bank's Claim is therefore nothing more than a claim for a deficiency
20 judgment, which is impermissible under CCP § 580d.

21 The Receiver believes that Celtic Bank will claim that it has an independent
22 secured claim with regard to the Deposits. California's anti-deficiency rules do not
23 bar a lender from pursuing a separately perfected security interest in personal
24 property. However, as detailed above in Section III.A.1., Celtic Bank's security
25 interest in the Deposits was extinguished by the entry of the Appointment Order, the
26 Receiver's turnover request, or the turnover of the Deposits in accordance with the
27 Court's instructions, meaning its claim to such funds is now barred.

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1 Celtic Bank could have pursued a judicial foreclosure sale and, having
2 completed the sheriff's sale process, pursued a deficiency judgment in accordance
3 with the CCP. Again, Celtic Bank instead made the decision not to pursue a judicial
4 foreclosure sale. As a result, Celtic Bank unilaterally waived its deficiency claim.

5 **B. The Celtic Claim Is Overstated.**

6 As noted above, the Receiver respectfully submits that the Celtic Claim is
7 barred, and subject to objection, in its entirety on account of the extinguishment of
8 Celtic Bank's security interest in the Deposits and its conclusion of a nonjudicial
9 foreclosure of the Fontana Project. That said, and even assuming, *arguendo*, that
10 the Celtic Claim were not barred (it is), the claim is overstated.

11 As of the date of the Receiver's appointment, the balance due on the Loans
12 was approximately \$2,865,989. Yet the Celtic Claim includes demands for
13 additional fees, over and above those associated with the balances of the Loans
14 including, at least, a baseless demand for \$86,741.00 in "Forceplaced Insurance
15 Costs". These costs were incurred completely unnecessarily given that the Receiver
16 had properly obtained and maintained insurance for the Property. (Donell Decl. ¶ 9,
17 Ex. 3.) Likewise, the Celtic Claim is unclear as to whether it intends to recover
18 default interest plus penalties (not permitted in this context) or otherwise to recover
19 fees and costs above what is owed on the Loans. For these reasons, as well as the
20 above, the Receiver respectfully submits that the Celtic Claim must be denied.

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1 **V. CONCLUSION.**

2 For the foregoing reasons, the Receiver respectfully submits that the Celtic
3 Claim is subject to objection, and denial, in its entirety, and requests that this Court
4 enter an order approving the Receiver's recommended denial of the claim.

5
6 Dated: October 2, 2017

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
DAVID R. ZARO
JOSHUA A. DEL CASTILLO
MELISSA K. ZONNE

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9 By: /s/ David R. Zaro

10 DAVID R. ZARO
11 Attorneys for Receiver
STEPHEN J. DONELL

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PROOF OF SERVICE

Securities and Exchange Commission v. Robert Yang, Suncor Fontana, et al.
USDC, Central District of California – Case No. 5:15-cv-02387-SVW (KKx)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 865 S. Figueroa Street, Suite 2800, Los Angeles, California 90017-2543.

A true and correct copy of the foregoing document(s) described below will be served in the manner indicated below:

**SPECIFIC OBJECTION OF RECEIVER, STEPHEN J. DONELL, TO
PROOF OF CLAIM OF CELTIC BANK**

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – the above-described document will be served by the Court via NEF. On **October 3, 2017**, I reviewed the CM/ECF Mailing Info For A Case for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

- **Zachary T. Carlyle**
carlylez@sec.gov,kasperg@sec.gov,karpeli@sec.gov,
blomgrene@sec.gov,pinkstonm@sec.gov,NesvigN@sec.gov
- **Stephen J. Donell**
jdelcastillo@allenmatkins.com
- **Mark T. Hiraide**
mth@msk.com,kjue@phlcorplaw.com,
hitabashi@phlcorplaw.com,eganous@phlcorplaw.com
- **Leslie J. Hughes**
hughesLJ@sec.gov,kasperg@sec.gov,pinkstonm@sec.gov,
nesvign@sec.gov
- **George D. Straggas**
George.straggas@straggasdean.com;sarah.borghese@straggasdean.com,
eric.dean@straggasdean.com
- **David J. Van Havermaat**
vanhavermaatd@sec.gov,larofiling@sec.gov,berryj@sec.vog,
irwinma@sec.gov
- **Joshua Andrew del Castillo**
jdelcastillo@allenmatkins.com

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- **David R Zaro**
dzaro@allenmatkins.com

2. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):** On **October 3, 2017**, I served the following person(s) and/or entity(ies) in this case by placing a true and correct copy thereof in a sealed envelope(s) addressed 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 that 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 date of deposit for mailing in affidavit. Or, I deposited in a box or other facility regularly maintained by FedEx, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelopes or packages designated by the express service carrier, addressed as indicated above on the above-mentioned date, with fees for overnight delivery paid or provided for.

Franchise Tax Board (FTB)
P.O. Box 2952
Sacramento, CA 95812-2952

Via U.S. Mail

Internal Revenue Service
880 Front Street
San Diego, CA 92101-8869

Via U.S. Mail

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. Executed on **October 3, 2017** at Los Angeles, California.

/s/ Martha Diaz
Martha Diaz