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E-FILED March __, 2017

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

<p>In re: C & S COMPANY, INC., Debtor.</p>	<p>Case No. BK-S-16-14155-MKN Chapter 11 Hearing Date: March 15, 2017 Hearing Time: 9:30am</p>
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**AMENDED REPLY TO DEBTOR'S OPPOSITION TO THE MOTION TO PROHIBIT
USE OF CASH COLLATERAL AND MOTION TO COMPEL SEGREGATION
OF CASH COLLATERAL AND OPPOSITION TO COUNTER-MOTION FOR
USE OF CASH COLLATERAL**

COMES NOW, FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR COLONIAL BANK, N.A. ("FDIC" or "Secured Creditor") hereby replies to Debtor's Opposition to the Motion to Prohibit Use of Cash Collateral and Motion to Compel Segregation of Cash Collateral and Opposition to Counter-Motion for Use of Cash Collateral as follows:

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENT

A. The Debtor Continues to Use the FDIC’s Cash Collateral Without Consent.

As more fully set forth in the Motion, the Cash Collateral Stipulation expired by its non-accelerated terms on December 31, 2016. As of that date, the Debtor was prohibited from using the cash collateral without the FDIC’s consent or this Court’s authorization following a notice and hearing. On January 26, 2017, the FDIC objected to the continued use of the cash collateral and demanded evidence of segregation. Additionally, though not required to do so, the FDIC filed a Renewed Notice of Non-Consent to the Use of Cash Collateral. [Docket No. 83] As the FDIC had not consented to, and this Court had not authorized, the Debtor’s continued use of cash collateral, the FDIC is entitled to an order prohibiting the Debtor from continuing to use the cash collateral. Having received no response from the Debtor, the FDIC filed the instant motion. In addition, the FDIC conducted the 2004 examination of the Debtor. During the examination, the Debtor confirmed it has continued to use the FDIC’s cash collateral subsequent to the expiration of the Cash Collateral Stipulation and has not segregated the cash collateral.

The Debtor testified as follows:

Q. Okay. Just so I’m clear and I don’t consider this a dispute, you are continuing to use the cash collateral of the FDIC despite the fact that you don’t have the expressed authority by the FDIC to use those funds?

A. Yes.

Q. Okay.

A. And if I didn’t use it, then I would have to close my doors.

Deposition Transcript at p. 115.

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1 Moreover, though the Debtor was required to segregate the cash collateral upon expiration
 2 of the stipulation, it has no understanding of what is required of the Debtor in that regard. (see 2004
 3 Examination Transcript dated February 17, 2017 at pp. 119-120, attached hereto as *Exhibit "A"*).

4
 5 **B. The FDIC Does Not Consent to the Use of its Cash Collateral and it is Not
 6 Adequately Protected.**

7 In response to the Motion, the Debtor filed its counter-motion seeking permission to allow
 8 the Debtor to use the FDIC's cash collateral.¹ As a threshold matter, the Debtor has failed to
 9 provide an analysis of the use, or duration of the proposed use, of the FDIC's cash collateral as is
 10 required pursuant to 11 USC § 4001(b)(1)(B)(ii). As a result, the Debtor's counter-motion to use
 11 the FDIC's cash collateral must be summarily denied. However, even if the counter-motion was
 12 appropriately supported, the Debtor has failed to demonstrate that the FDIC is adequately
 13 protected.

14 Under § 363(c)(2), a debtor may not use cash collateral unless consented to by the entity
 15 that has an interest in the cash collateral or with court authorization. Section 363(e) provides that
 16 on request of an entity that has an interest in property to be used by the debtor, the court shall
 17 prohibit or condition the use "as is necessary to provide adequate protection of such interest." The
 18 debtor has the burden of proof on the issue of adequate protection. § 363(p)(1).

19
 20 The Code does not define adequate protection but sets forth three alternative non-exclusive
 21 methods by which adequate protection may be provided when required under § 363: (1) periodic
 22 cash payments; (2) additional or replacement liens; or (3) other relief resulting in the "indubitable
 23 equivalent" of the secured creditor's interest in such property. § 361. The determination of
 24 adequate protection is a question of fact for the trial court. *In re Bear River Orchards*, 56 B.R. 976,
 25 979 (Bankr.E.D.Calif.1986).

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 1 Curiously, contemporaneous with the filing of its opposition to the instant Motion and counter-motion for the use of
 cash collateral, the Debtor independently filed a separate and distinct motion for the use of cash collateral [Docket 90
 J]. The FDIC incorporates by this reference those arguments in opposition to the Debtor's motion more fully set forth
 in its separately filed opposition [Docket 106].

1 Courts have recognized the breadth of adequate protection. “The goal of adequate
2 protection is to safeguard the secured creditor from diminution in the value of its interest during
3 the Chapter 11 reorganization.” *In re Mosello*, 195 B.R. 277, 288 (Bankr.S.D.N.Y.1996) (quoting
4 *In re 495 Central Park Avenue Corp.*, 136 B.R. 626, 631 (Bankr.S.D.N.Y.1992)). “The concept of
5 adequate protection was designed to ‘insure that the secured creditor receives the value for which
6 he bargained.’ “*In re Martin*, 761 F.2d 472, 474 (8th Cir.1985) (quoting S.Rep. No. 989, 95th
7 Cong., 2d Sess. 53, *reprinted* in 1978 U.S.Code Cong. & Ad.News 5787, 5839 (emphasis added)).
8 “Secured creditors should not be deprived of the benefit of their bargain.” *In re Am. Mariner*
9 *Indus., Inc.*, 734 F.2d 426, 431 (9th Cir.1984), effectively overruled on other grounds by *United*
10 *Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 368, 108 S.Ct. 626, 98
11 L.Ed.2d 740 (1988). As the Ninth Circuit Court of Appeals set forth from the House Report,

12
13
14 There may be situations in bankruptcy where giving a secured creditor an absolute
15 right to his bargain may be impossible or seriously detrimental to the bankruptcy laws.
16 Thus, this section recognizes the availability of alternate means of protecting a secured
17 creditor's interest. Though the creditor might not receive his bargain in kind, the purpose of
18 the section is to insure that the secured creditor receives in value essentially what he
19 bargained for. *American Mariner*, 734 F.2d at 431 (quoting H.R.Rep. No. 595 at 339,
20 1978 U.S.Code Cong. & Ad. News at 6295).

21 “Whether protection is adequate depends directly on how effectively it compensates the
22 secured creditor for loss of value.” *American Mariner*, 734 F.2d at 432. While sections 361(1) and
23 (2) by their own terms compensate for a decrease in value, the “compensatory nature of adequate
24 protection is even more apparent from the catch-all alternative of section 361(3).” *American*
25 *Mariner*, 734 F.2d at 432.

26 While the Debtor proffers the continued payment of \$5,500 per month, it has failed to meet
27 its statutory burden to establish that the periodic cash payment will adequately protect its interest.
28 Additionally, the Debtor does not offer to provide replacement liens on any post-petition
receivables – to that extent such receivables were generated. As noted in the Motion,

1 post-petition, the Debtor accounts receivable have been reduced from \$1,343,533 as of 9/30/16 to
2 \$611,810 as of 12/31/16, or a reduction of \$731,723 in three months. The cash has decreased from
3 \$237,627 to \$107,726. Therefore the net decrease in the collateral value between the accounts
4 receivables and cash combined was **\$861,434** in the three months from 9/30/16 to 12/31/16.
5

6 As of the filing of this opposition, the Debtor has yet to file its January monthly operating
7 report. And, while the Debtor states that it is operating profitably, the most recent operating report
8 filed by the Debtor reflects a net loss of \$347,470 from operations in the month of December 2016.
9 [Docket 76]. As post-petition receivables are not keeping pace with the diminution of the
10 pre-petition collateral, coupled with the fact that the Debtor is operating at a loss, the FDIC is not
11 adequately protected.
12

13 Additionally, post-petition, the Debtor's bonding limit was revoked and, resultantly, the
14 Debtor is no longer permitted to act in the capacity of a general contractor (see 2004 Examination
15 Transcript dated February 17, 2017 at p. 28, attached hereto as *Exhibit "B"*). Because it has lost
16 its ability to act in the capacity of a general contract, it has not entered into any new contracts since
17 the commencement of its bankruptcy.
18

19 **C. The FDIC is a Secured Creditor.**

20 On August 17, 2016, the FDIC filed its Proof of Claim 3-1 attaching thereto the Restated
21 Note and the Restated Security Agreement executed by Stacey Lindburg, president of the Debtor.
22 As of the date of this Reply, the Debtor has not objected to the claim. Nor could it.

23 Post confirmation of the Debtor's First Bankruptcy, the Debtor refused, and continued to
24 refuse, to execute and deliver the Amended and Restated Note and Restated Security Agreement
25 required pursuant to the terms of the confirmed plan. Accordingly, on May 15, 2014, the FDIC
26 filed a Motion to Compel Plan Compliance 11 U.S.C. 1142 [Docket No. 836] seeking an order
27 compelling the Debtor to execute and deliver the Amended and Restated Note and Restated
28

1 Security Agreement – attaching thereto the proposed form of those documents.

2 On July 9, 2014, this Court entered an Order Compelling Plan Compliance 11 U.S.C.
3 1142(b) requiring the Debtor, within 5 days, to execute the Amended and Restated Note and
4 Security Agreement and deliver the same to counsel for the FDIC. [Docket No. 852]

5 Pursuant to the Order Compelling Compliance, the Debtor executed and delivered the
6 Amended and Restated Note and Security Agreement. The Debtor now argues, without evidence,
7 that the note is not secured and the amount of the indebtedness is disputed. The Debtor has failed
8 to satisfy its burden.
9

10 Section 502(a) of the Bankruptcy Code provides that a proof of claim is deemed allowed
11 unless a party-in-interest objects. This concept was expanded by *In re Holm*, 931 F.2d 620, 623
12 (9th Cir.1991) where the court stated “[i]f those allegations in [the proof of claim] set forth all of
13 the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish
14 the claim (emphasis supplied).” The claimant must first allege facts sufficient to support its claim;
15 if the averments in the filed proof of claim are sufficient to do so, then the proof of claim is entitled
16 to *prima facie* validity. *In re Consolidated Pioneer Mortgage*, 178 B.R. 222, 226 (9th Cir. BAP
17 1995), citing *In re Allegheny International*, 954 F.2d 167, 173–74 (3rd Cir.1992).

18
19 As noted above, the Debtor has not filed an objection to the Proof of Claim filed by
20 the FDIC. And, even if it had, it has not produced any evidence to rebut the *prima facie* validity
21 of the claim. Even if there is an objection filed to the claim, the evidentiary effect of Rule 3001(f)
22 remains in force. *In re Wells*, 51 B.R. 563, 566 (Bankr.D.Col.1985). The objecting party carries the
23 burden of going forward with evidence in support of its objection which must be of probative force
24 equal to that of the allegations of the creditor's proof of claim. *Id.* “[T]he objector must produce
25 evidence which, if believed, would refute at least one of the allegations that is essential to the
26 claim's legal sufficiency.” *In re Allegheny International, Inc.*, 954 F.2d 167, 173–74 (3d
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1 Cir.1992). If the objecting party succeeds in overcoming the *prima facie* effect of the proof of
2 claim, the ultimate burden of persuasion then rests on the Claimant. *Id.* at 174.

3 The Debtor offers no evidence, admissible or otherwise, to support its contention that the
4 FDIC is unsecured. Rather, it argues that the claim in the First Bankruptcy may have been
5 under-secured and that the plan treatment did not permit the FDIC to accrue interest, costs and
6 attorney fees. The argument is simultaneously untimely and belied by the fully executed
7 Amended and Restated Note and Security Agreement – which the Debtor acknowledges having
8 signed following the entry of the Order Compelling Plan Compliance.
9

10 **II.**

11 **CONCLUSION**

12 The Debtor has failed to comply with the mandate of 11 USC § 4001 as it has not supported
13 the counter-motion with the intended use of funds or the duration of the request. Nor has the
14 Debtor satisfied its burden to establish that the FDIC will be adequately protected. Accordingly,
15 the Debtor’s counter-motion must be denied.
16

17 Additionally, as the FDIC has not consented to the continued use of its cash collateral, it is
18 entitled to an order of this Court compelling the Debtor to segregate and account for all cash
19 collateral in its possession.
20

21 DATED this 7 day of March, 2017.

22 **SYLVESTER & POLEDNAK, LTD.**

23 By: _____
24 Jeffrey R. Sylvester, Esq.
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27 *Attorneys for Creditor FDIC-R for Colonial*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of March, 2017, I served a copies of the above and foregoing, via ELECTRONIC SERVICE ECF System, where an email address is provided and by depositing the same in the United States Mail, first class, postage prepaid, addressed to those not electronically mailed.

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An employee of SYLVESTER & POLEDNAK, LTD.

EXHIBIT
A

EXHIBIT
A

1 docket?

2 A. No.

3 Q. Okay. And this is the first time that
4 you've seen a copy of the renewed notice of
5 nonconsent to unauthorized use of cash collateral?

6 A. Yes.

7 Q. Okay. When you first learned it, I'm not
8 really sure when it was, but when you first learned
9 the FDIC has taken the position that you were no
10 longer authorized to use cash collateral, did you
11 seek to segregate or hold all or any portion of its
12 cash collateral?

13 MR. WINTERTON: Objection. Asked and
14 answered

15 BY MR. SYLVESTER:

16 Q. You can answer.

17 A. No, I don't, I don't -- when Dave and I
18 had a conversation regarding this hearing and
19 renewing the cash lateral --

20 MR. WINTERTON: Yeah. You can't talk
21 about what we talked about.

22 THE WITNESS: Okay.

23 BY MR. SYLVESTER:

24 Q. I don't want to know what you guys talked
25 about. I just want to know why --

1 A. No.

2 Q. -- you didn't do it, why you didn't
3 segregate it.

4 Have you ever heard of the word
5 segregation in the context of cash collateral
6 before?

7 A. No.

8 Q. Did you have an understanding as to
9 debtor possession that --

10 A. I am -- I am going to tell you if you
11 look at it in the way my December billings and
12 January billings was, the payments that I sent for
13 \$5500 was probably all of my profit.

14 Q. So let me just --

15 A. So if you -- without -- if that's what
16 you're saying the cash collateral is, I mean.

17 Q. Let me just finish my question. Did you
18 understand as a debtor in possession that without
19 the consent of the secured creditor that you had to
20 segregate its cash collateral?

21 A. I did not.

22 Q. As of the petition date, let me ask
23 you -- let me withdraw the question.

24 Have you made any payments post-petition
25 to any pre-petition creditors?

**EXHIBIT
B**

**EXHIBIT
B**

1 that a little bit.

2 Is it your understanding, your testimony
3 that as of the petition date the bond was revoked?

4 A. Yeah, my bonding limit was revoked.

5 Q. And does that then -- are you not then
6 permitted to perform construction related services?

7 A. A lot of them I am not. I am limited by
8 the amount of work that I can do due to the fact
9 that I filed.

10 Q. Okay. So I don't know how it works.

11 A. Right.

12 Q. And so I'll ask you for your expertise in
13 that area. You had to have -- or you have to as a
14 general Class A engineering contractor required to
15 have a bond, right?

16 A. That's correct.

17 Q. And what was the bond amount requirement?
18 Do you recall?

19 A. I think on my license is 25 or 50. I'm
20 not sure.

21 Q. Million?

22 A. No. That's what I have to have to carry
23 my license through the State Contractors Board.

24 Q. Uh-huh.

25 A. And --