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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, and individual,</p> <p style="text-align: center;">Defendants.</p>	<p>RECEIVER'S REPLY TO MEMORANDUM IN OPPOSITION TO RECEIVER'S SECOND MOTION SEEKING AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS</p> <p>2:12-cv-00591 BSJ</p> <p>The Honorable Bruce S. Jenkins</p>
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R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of National Note of Utah, LC, its subsidiaries and affiliates, and the assets of Wayne LaMar Palmer, by and through his counsel, hereby files this reply (the "Reply") in support of *Receiver's Second Motion Seeking Authorization to Sell Elkhorn Ridge Cabin Free and Clear of Purported Interests and Memorandum in Support* (the "Motion"), and in opposition to the *Memorandum in Opposition to Receiver's Second Motion Seeking Authorization to Sell Elkhorn Ridge Cabin Free and Clear of*

Purported Interests (the “Opposition”) filed by Defendant Palmer.¹ The Motion and this Reply are supported by the *Supplemental Declaration of Receiver R. Wayne Klein* (the “Supplemental Receiver Declaration”) which has been filed concurrently herewith. All capitalized terms not otherwise defined herein, have the meaning attributed to them in the Receiver’s Motion and Memorandum in Support.

Introduction

As detailed in the Motion, the Receivership Order vests the Receiver with authority to sell and transfer title to all real property in the Receivership Estate upon order of the Court pursuant to procedures as may be required by the Court and additional authority such as 28 U.S.C. §§ 2001 and 2004.² The Opposition alleges that the Receiver: (a) is obligated to ask this Court to appoint three independent appraisers; (b) erred by not obtaining all three appraisals prior to entering into the Purchase Agreement; (c) potentially influenced the remaining two appraisers by entering into the Purchase Agreement; and (d) should have finished and repaired the cabin on Elkhorn Ridge Lot # 1 before selling it.³ For the reasons stated below, each of these allegations is without merit and the Opposition should be overruled. The Receiver has complied with 28 U.S.C. § 2001(b), Defendant Palmer’s allegations are unsupported, and the Elkhorn Ridge Lot #1 sale as set forth in the Updated Purchase Agreement, as that term is defined in the Supplemental Receiver Declaration, should be approved. This sale provides the Receivership Estate with \$143,100.00 in cash with the purchase price being 108% of the Average Appraised Value of the

¹ The Opposition states that it is filed on behalf of Palmer and NNU, yet only the Receiver has authority to represent NNU at this time. Accordingly, the Opposition is filed solely by Defendant Palmer.

² Docket No. 9 (Receivership Order), *as amended*, Docket No. 50 at ¶ 39.

³ Opposition at pp. 2-3.

property.⁴

Reply

A. The Receiver Requests that the Three Appraisers be Approved by the Court Through the Order Granting the Motion

Section 2001(b) of title 28 of the United States Code requires that the Court appoint three “disinterested” appraisers prior to “confirmation “of any sale. The Receiver requests that the three appraisers who submitted appraisals on Elkhorn Ridge Lot # 1 be approved as Court-appointed appraisers prior to and as part of confirmation of the sale contemplated in the Motion. Each of the three appraisers: (a) Jordan Jensen; (b) Val Jensen; and (c) Angela Bair, is a Certified Appraiser,⁵ and each certified in his or her appraisal that: (i) such appraiser has “no present or prospective interest in the property that is the subject of this report;” and (ii) compensation for such appraiser was not contingent upon the development of a predetermined value.⁶ Accordingly, each of the three appraisers is a disinterested person⁷ as required by 28 U.S.C. § 2001(b) and therefore should be appointed by the Court as the appraisers of Elkhorn Ridge Lot # 1.

B. The Receiver Requests that This Court Authorize the Sale of the Elkhorn Ridge Lot # 1 Pursuant to the Updated Purchase Agreement

By the Motion, the Receiver seeks authority to sell Elkhorn Ridge Lot #1 pursuant to the Updated Purchase Agreement that is attached as Supplemental Exhibit 3 to the Supplemental

⁴ Supplemental Receiver Declaration, at ¶¶ 8 (defining Average Appraised Value) & 19 (discussing Updated Purchase Agreement and value to be received) & Supplemental Exhibit 3 (Updated Purchase Agreement).

⁵ Supplemental Receiver Declaration at ¶28; see also *id.*, Supplemental Exhibit 4, Supplemental Exhibit 5 and Supplemental Exhibit 6 (each providing information about the appraisers).

⁶ Supplemental Receiver Declaration at ¶ 29; see also Receiver Declaration, Exhibit 2 (first appraisal); Supplemental Receiver Declaration, Supplemental Exhibits 1 and 2 (second and third appraisals).

⁷ Supplemental Receiver Declaration at ¶ 27.

Receiver Declaration. This Updated Purchase Agreement was obtained after the publication of the Court-Approved Notice, as defined in the Supplemental Receiver Declaration.⁸ The proposed sale is the same as those proposed in the Motion, but increases the purchase price to \$143,100.00, 108% of its Average Appraised Value.⁹ The Receiver has determined it is in the best interest of the Receivership Estate to accept the Updated Purchase Agreement as the highest and best offer for Elkhorn Ridge Lot #1,¹⁰ and this sale was negotiated in good faith and is the product of arm's length negotiations.¹¹ Other than the Updated Purchase Agreement, the Receiver has received no other higher and better offers for Elkhorn Ridge Lot #1.¹² Accordingly, the Receiver asks that the Court grant the Motion and authorize the sale as proposed.

C. The Receiver's Marketing and Selling Elkhorn Lot # 1 Complies with 28 U.S.C. § 2001(b)

As set forth in the Memorandum, the Receiver Declaration and the Supplemental Receiver Declaration, the process employed by the Receiver to market and sell Elkhorn Ridge Lot # 1 is consistent with Section 2001(b) and the practice of receivers in this jurisdiction and in other jurisdictions. The Receiver obtained a listing price for the property from two independent and experienced professionals, including a licensed and disinterested appraiser, marketed the property for sale through an experienced and independent broker, obtained a competitive offer tied to market, sought approval of the offer obtained and ordered two additional independent

⁸ See Supplemental Receiver Declaration at ¶ 19.

⁹ Id. at ¶¶ 20-23. It should be noted that the Supplemental Receiver Declaration erroneously listed the purchase price in the Updated Purchase Agreement as \$143,000. The actual purchase price under the Updated Purchase Agreement is \$143,100.

¹⁰ Id. at ¶ 21.

¹¹ Id. at ¶ 24.

¹² Id. at ¶ 20.

appraisals of the property, published the Court-Approved Notice of the sale in accordance with this Court's Order, and kept the sale open for higher and better offers consistent with Section 2001(b).¹³ As result of this process, and good faith and arms' length negotiations, the Receiver has accepted, subject to Court approval, the Updated Purchase Agreement, which offers to purchase Elkhorn Ridge Lot #1 for 108% of its Average Appraised Value.¹⁴ Accordingly, the sale should be approved.

The Opposition argues that the Receiver did not comply with Section 2001(b) because he did not obtain court-approved appraisers prior to listing the property. This argument is without merit. Section 2001(b) states “[b]efore confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities.”¹⁵ The plain language of Section 2001 is clear and unambiguous; the Court shall appoint the appraisers before confirmation of any sale – not before listing the property or before entering into a purchase agreement.

This Court has recognized that the appointment of the three appraisers as required by Section 2001(b) can occur on the same date as the order confirming the private sale of the property.¹⁶ In addition, other jurisdictions have found that the receiver has complied with Section 2001(b) when the motion seeking approval of the private sale included three appraisals

¹³ See Receiver Declaration and Supplemental Receiver Declaration.

¹⁴ See Supplemental Receiver Declaration & Supplemental Exhibit 3.

¹⁵ 28 U.S.C. § 2001(b) (emphasis added).

¹⁶ See SEC v. Management Solutions, Inc. et al., Civ. No. 2:11-cv-01165, Docket Nos. 206 & 207.

from disinterested persons.¹⁷ Here, the Receiver has provided this Court with the certificates of three disinterested and licensed appraisers as well as copies of each of the three appraisals prior to the confirmation of the private sale.¹⁸ Therefore, it would be appropriate for this Court to appoint the three appraisers pursuant to Section 2001(b) and authorize the private sale of Elkhorn Ridge Lot #1 as requested in the Motion.

Finally, the practice suggested by the Opposition is not advisable or in the best interest of the Receivership Estate and investors. Depending on the property in question, obtaining appraisals can cost between several hundred and several thousand dollars.¹⁹ Thus, to conserve the relatively limited assets of this Receivership Estate, it is important that the appraisals a receiver obtains be useful and serve the purposes for which they are obtained.²⁰ Obtaining three potentially costly appraisals at the time of listing would not aid the process of obtaining a fair market value listing price. Additionally, given the time necessary to market various properties, the three appraisals could become stale by the time of sale confirmation, thus requiring additional expense of obtaining additional appraisals.

Thus, the Receiver has determined that the best practice in this case is to list properties for sale based on the advice of his independent and experienced real estate broker and the value attributed to the property by a disinterested, independent licensed appraiser. After obtaining an offer to purchase the property that the Receiver deems to be acceptable, he orders two additional appraisals of the property, so as to have the three appraisals required by Section 2001(b). As

¹⁷ See Brewer, 2009 WL 1313211 at *1 (M.D. Fla.).

¹⁸ See Receiver Declaration, Exhibit 2 (first appraisal); Supplemental Receiver Declaration, Supplemental Exhibits 1-2 (second and third appraisals).

¹⁹ Id. at ¶ 35.

²⁰ Id.

here, the Receiver will have provided copies of all three appraisals to the Court prior to confirmation of the sale. In the Receiver's opinion, this practice is reasonable and ensures at least the following: (a) that property is being offered for sale at its fair market value determined by experienced professionals familiar with the market in question; and (b) that at least the second two appraisals obtained provide a valuation close in time to confirmation of the proposed sale so as to avoid the expense of obtaining updated appraisals at that time—given the time that it may take to market certain properties, appraisals obtained at the time of listing may be outdated by the time of sale confirmation.²¹

D. Defendant Palmer's Allegations of Predetermined Value Are Not Supported by the Evidence

Contrary to the Opposition's wholly unsupported allegation that the Receiver gave the second and third appraisers a "target to hit" by entering into the Purchase Agreement prior to the completion of such appraisals, the Receiver did not have any communications with those appraisers giving them a target amount.²² Additionally, the appraisers, as licensed professionals, have certified that they are independent and that no predetermined value was attributed to Elkhorn Ridge Lot #1.²³ The three appraisals yielded the following appraised values for Elkhorn Lot # 1: (a) \$135,000; (b) \$126,000; and (c) \$135,000²⁴ for an average appraised value of \$132,000.²⁵ The fact that these appraisals differ indicates that there is no collusion between the appraisers and the Receiver and that no predetermined value exists. And the fact that the

²¹ Supplemental Receiver Declaration at ¶ 37

²² Id. at ¶¶ 30 and 31.

²³ Supplemental Receiver Declaration at ¶ 29.

²⁴ Receiver Declaration, Exhibit 2; Supplemental Receiver Declarations, Supplemental Exhibits 1-2.

²⁵ Id. at ¶ 8.

Receiver obtained three, and only three, appraisals as required under Section 2001(b) indicates that he was not “shopping” appraisers as suggested in the Opposition.²⁶

E. The Cabin Should Not Be Completed Prior to Sale

The Receiver has determined that completing the partially constructed cabin on Elkhorn Ridge Lot #1 as urged by the Opposition is not in the best interests of the Receivership Estate and the investors for at least the following reasons: (a) the Receivership Estate does not have sufficient resources to engage in property development; (b) allowing the sale as proposed will result in cash that is 108% of Elkhorn Ridge Lot #1’s Average Appraised Value; (c) there is no assurance that monies spent to complete the cabin would increase its value by more than the amounts expended for additional construction; and (d) selling Elkhorn Ridge Lot #1 as proposed will be beneficial to the Receivership Estate for the reasons set forth in the Receiver Declaration.²⁷

²⁶ Id. at ¶¶ 25 and 26.

²⁷ Id. at ¶ 34.

CONCLUSION

Having the appraisers appointed by the Court prior to but as part of the confirmation of the sale is in accord with the express language of 28 U.S.C. § 2001(b) and the Receivership Order, and provides for the most fair, efficient and cost effective manner of liquidating property of the Receivership Estate so as to maximize its value for the benefit of investors. The disinterested appraisers should be approved and the Motion authorizing the proposed sale should be granted. A proposed Order is submitted herewith and attached hereto as **Exhibit A**.

DATED this 3rd day of January, 2013.

DORSEY & WHITNEY LLP

/s/Peggy Hunt

Peggy Hunt

Jeffrey M. Armington

Attorneys for Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **REPLY** was filed with the Court on this 3rd day of January, 2013, and served via ECF on all parties who have requested notice in this case, and by email to the following parties:

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“Exhibit A”

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Attorneys for Court-Appointed Receiver R. Wayne Klein

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

SECURITIES AND EXCHANGE COMMISSION,	ORDER APPOINTING APPRAISERS AND GRANTING RECEIVER'S SECOND MOTION SEEKING AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS
Plaintiff,	2:12-cv-00591 BSJ
v.	The Honorable Bruce S. Jenkins
NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, and individual,	
Defendants.	

The matter before the Court is the *Second Motion Seeking Authorization to Sell Elkhorn Ridge Cabin Lot Free and Clear of Purported Interests* [Docket No. 92] (the "Motion") and the *Memorandum in Support* attached to the Motion filed by R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") in the above captioned case. A hearing was held on the Motion on January 4, 2012, with appearances being noted on the record. The Court has reviewed the Motion, the *Declaration of R. Wayne Klein, Receiver*, together with all of the Exhibits attached

thereto [Docket No. 93], the *Objection* filed by Wayne L. Palmer [Docket No. 104], the Receiver's *Reply*, and the *Supplemental Declaration of R. Wayne Klein, Receiver*, together with all of the Exhibits attached thereto, all other papers filed related thereto, applicable law, and the representations of counsel and record from the hearing, and applicable law. Based thereon, and for good cause appearing,

IT IS HEREBY ORDERED that:

(1) Jordan Jensen, Val Jensen, and Angela Bair are hereby **APPROVED** as Court-appointed appraisers of the real property defined in the Motion as "Elkhorn Ridge Lot #1" pursuant to 28 U.S.C. § 2001(b);

(2) The Objection is **OVERRULED** and the Motion is **GRANTED**;

(3) The sale of Elkhorn Ridge Lot # 1 as set forth in the Updated Purchase Agreement attached as Exhibit 3 to the *Supplemental Declaration of R. Wayne Klein, Receiver* free and clear of all purported interests against such property is **APPROVED**;

(3) Interests against Elkhorn Ridge Lot #1, if any, shall attach to the "Net Sale Proceeds," as that term is defined in the Motion, and the Receiver shall separately account for such Net Sale Proceeds until such time as the interests are released voluntarily, or a final order related to the allowance of such interests is entered by the Court.

DATED this _____ day of _____, 2013.

BY THE COURT

The Honorable Bruce S. Jenkins
United States District Court Judge