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

SECURITIES AND EXCHANGE COMMISSION,  Plaintiff,  v.  NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, and individual,  Defendants.	<b>RECEIVER'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE</b>   2:12-cv-00591 BSJ  Judge Bruce S. Jenkins
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R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of National Note of Utah, LC ("National Note"), Wayne LaMar Palmer ("Palmer"), and the Palmer Entities,<sup>1</sup>

<sup>1</sup> The "Palmer Entities" include any and all subsidiaries and affiliated entities, including but not limited to, Land, Utah, LC; Passport Properties, L.C.; The Property Company, LLC; The Corner Corporation; Territory Land Company, Incorporated; Koala T Investments LLC; Prime Wave I, LLC; Note Systems, Inc.; DPLM LLC; Ovation 106, LLC; Top Flight, LLC; Freedom Minerals I, LLC; Homeland Funding Corp.; Homeland Mortgage, L.C.; Centennial Aviation, LLC; Homeland Minerals, LLC; Riverbend Estates LC; Homeland Holding Corp.; Spanish Fork Development, L.L.C.; Indian Canyon, LLC; Freedom Minerals II LLC; Homeland Mortgage, Inc.; Real Estate Finance Institute, Inc.; Vision Land, LLC; Old Glory Mining Company, LLC; Presidential Utah Properties LC; Traditions in Timber; HSB Technologies, LLC; Bonneville Minerals, LLC; Twin Pines Property, LC; NPL America LLC; Network Leisure Shoppes, Inc.; Elkhorn Ridge, LLC; and Expressway Business Park Owners Organization, LLC.

opposes the *Combined Motion to Intervene and Supporting Memorandum* (the “Motion”)<sup>2</sup> filed by American Pension Services, Inc. (“APS”) because: (a) the Motion fails to include “a pleading that sets out the claim or defense for which intervention is sought” as required by Fed. R. Civ. P. 24(c); (b) the Motion does not meet the requirements described in Fed. R. Civ. P. 24(a)(2) to intervene as a matter of right;<sup>3</sup> (c) although APS was never identified in any posting on the Receiver’s website, the Receiver took numerous actions to appease APS with each action being met by APS making increasingly more burdensome requests; and (d) APS’s intervention is barred by Section 21(g) of the Securities Exchange Act of 1934 (the “Exchange Act”). Because APS has failed to meet the requirements necessary to support the Motion, its request to intervene should be denied.

Simply put, parties such as APS, who allege no particularized harm and who merely disagree with the views expressed and positions taken by the Receiver should not be allowed to run into Court and seek to intervene in this case without any description of the relief they seek or any cognizable claim. The Receiver believes the estate’s limited resources, not to mention the Court’s resources, should not be squandered responding to complaints by persons who have not articulated the relief that they seek. The Motion does not attach a complaint, does not state with any particularity what relief APS is seeking,<sup>4</sup> does not argue why APS was implicated by the allegedly erroneous advice posted on the Receiver’s website, and does not state any authority for

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<sup>2</sup> Docket No. 101.

<sup>3</sup> The Motion does not raise permissive intervention pursuant to Fed. R. Civ. P. 24(b). Thus, the Receiver will not address the requirements for permissive intervention, but he believes that permissive intervention is equally inappropriate at this point.

<sup>4</sup> Motion at 3 (“APS should be allowed to intervene in this Action to seek relief from this Court concerning the advice the Receiver continues to post on his website . . .”).

the proposition that APS should be clothed with the power to protect investors.<sup>5</sup> Being forced to confront potential litigation from every entity with some connection to the receivership estate or to investors will not advance the purpose of efficient administration of the receivership estate. Thus, denying the Motion will allow the Receiver to continue his efforts to unravel the complex network of transactions, secure the assets of the Receivership estate, efficiently formulate a claim and distribution plan for the Court that benefits all creditors and investors, and hopefully discourage the filing of similar motions in the future. Accordingly, the Motion should be denied.

### **BACKGROUND**

1. On June 25, 2012, the Securities and Exchange Commission (the “SEC”) filed a complaint against National Note and Palmer (the “Complaint”).<sup>6</sup>

2. The Complaint arises out of an alleged “Ponzi scheme” operated by Palmer through National Note.<sup>7</sup>

3. The Complaint alleges five causes of action: (a) employment of a device, scheme, or artifice to defraud; (b) fraud in the offer and sale of securities; (c) fraud in connection with the purchase and sale of securities; (d) offer and sale of unregistered securities; and (e) offer and sale of unregistered securities by an unregistered broker or dealer.<sup>8</sup>

4. Also on June 25, 2012, the Court entered the Order,<sup>9</sup> pursuant to which, the Court appointed the Receiver and took exclusive jurisdiction and possession of the assets of Palmer, National Note, and Palmer’s interest in the Palmer Entities, and stayed all litigation involving

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<sup>5</sup> *Id.* (“APS has met the minimal burden of showing that its interests and the investors’ interests are not adequately represented by the current parties and should be allowed to intervene.”).

<sup>6</sup> Docket No. 1.

<sup>7</sup> *Id.* at 1-2.

<sup>8</sup> *Id.* at 10-13.

<sup>9</sup> Docket No. 9.



Palmer, National Note, and the Palmer Entities.<sup>10</sup>

5. Some National Note investors' investments are held in custodial accounts by entities such as APS. On August 8, 2012, the Receiver posted on his website a document entitled "Paying Custodial Fees for Retirement Accounts," which National Note investors could access at <http://www.kleinutah.com/wp-content/uploads/2012/06/08.04.2012-IRA-Custodian-Alternativesr.pdf> (the "IRA Information Posting").<sup>11</sup>

6. The IRA Information Posting, which presented information and outlined various alternatives to investors, stated in relevant part: (a) "some IRA administrators or custodians have been telling investors that they are required to continue paying the extremely high fees or the account will be closed;"<sup>12</sup> (b) "in some cases, the custodians have threatened that if investors close the accounts, the custodian will send tax notices that treat it as a distribution of the full amount;"<sup>13</sup> (c) "one of the investors forwarded us information he received from the IRS about alternatives;"<sup>14</sup> and (d) "it appears that there are alternatives to continue paying the high maintenance fees on IRA and Roth IRA retirement accounts."<sup>15</sup> The Receiver did not refer to APS anywhere in the IRA Information Posting.<sup>16</sup>

7. On August 30, 2012, after several discussions with Receiver's counsel, counsel for APS sent the Receiver's counsel a letter informing the Receiver that APS would seek relief

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<sup>10</sup> *Id.* at 3-6 and 13-14.

<sup>11</sup> *See* Motion Exh. A.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Frankly, unless APS wants to argue that it charges "extremely high fees" or has "threatened investors" it is impossible to ascertain how any of the information supplied in the IRA Information Posting implicates APS.

from the Court if the IRA Information Posting was not removed from the Receiver's website.<sup>17</sup>

8. On or about September 5, 2012, the Receiver removed the link to the IRA Information Posting on his website, directing investors to seek independent advice on these issues and APS seemed satisfied with such action while APS and the Receiver negotiated certain language that would be placed on the Receiver's website.

9. On September 6, 2012, counsel for APS sent an e-mail to the Receiver's counsel demanding a "retraction, warning or curative statements" related to the IRA Information Posting and alleging that APS's business reputation had been attacked despite the complete absence of reference to APS in the IRA Information Posting.

10. On or about October 12, 2012, APS's counsel again sent Receiver's counsel an email, threatening legal action over another posting on the Receiver's website. This threat concerned the Receiver's answer to several "frequently asked questions" which encouraged investors to "consider alternatives to paying high custodial fees," and suggested that "other parties, such as retirement custodians, might share some responsibility for [investor] losses."<sup>18</sup> Again, despite not identifying APS in any way, APS somehow felt attacked by the Receiver's response to inquiries, which suggested that investors explore their options.

11. On October 17, 2012, to placate APS, the Receiver agreed to alter his response to the frequently asked question by removing the reference to "high" custodial fees, removing the reference to "retirement custodians," and telling investors that "it may be advisable to seek independent guidance from your tax advisor on these issues."<sup>19</sup>

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<sup>17</sup> Motion at Exh. B.

<sup>18</sup> See Exhibit A attached hereto, pages printed from the Receiver's website, identifying proposed changes sought by APS.

<sup>19</sup> See Exhibit B attached hereto, showing Receiver's proposed changes to the frequently asked questions in response to APS's demand.

12. Although the Receiver removed the link to the IRA Information Posting from his website, apparently and without his knowledge, the posting was still searchable online through internet searches. APS informed the Receiver of this fact and the Receiver, through his IT professional has ensured APS that the IRA Information Posting cannot be found online by removing the actual PDF of the IRA Information Posting.<sup>20</sup>

13. Not satisfied, APS filed the present Motion. Although it is not clear in the Motion, APS apparently seeks a full retraction of the IRA Information Posting. For the reasons stated below, this is not a basis for intervention inasmuch as no claims can be identified.

### ARGUMENT

#### **I. APS Has Not Complied With The Requirements Of Rule 24(c).**

Rule 24(c) of the Federal Rules of Civil Procedure states that a motion to intervene “*must* . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” (Emphasis added). The purpose of this rule is to place the parties on notice of the claimant’s position, the nature and basis of the claim asserted, and the relief sought by the intervenor.<sup>21</sup> The requirement also allows the Court (and the parties) to judge in concrete terms the interest the party claims to have, and whether the motion meets the requirements of Rule 24(a).

In this case, the Motion is not accompanied by any pleading. Because of this, it is impossible to ascertain what APS seeks to accomplish through intervention, or even whether APS seeks to intervene as a plaintiff or a defendant in this case. Also, absent a pleading, it is impossible for the Court to determine that APS meets the requirements for intervention pursuant

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<sup>20</sup> However, through the filing of the Motion, the IRA Information Posting is now accessible on PACER.

<sup>21</sup> See *Dillard v. City of Foley*, 166 F.R.D. 503, 506 (D.C. Ala. 1996).



to Fed. R. Civ. P. 24(a)(2). Accordingly, the Motion should be provisionally denied, with leave to refile a motion that attaches a proposed pleading (Complaint or Answer) in compliance with Rule 24(c).<sup>22</sup>

**II. APS Does Not Meet The Requirements For Intervention Under Fed. R. Civ. P. 24(a)(2)**

The Tenth Circuit has described the four requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a)(2) as follows:

(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by the existing parties.<sup>23</sup>

"Failure to satisfy even one of these requirements is sufficient to warrant denial of a motion to intervene as a matter of right."<sup>24</sup> The Motion fails to demonstrate that APS's interests have been impaired by the Receiver.

**A. APS Has No Interest Relating To The Property Or Transaction Which Is Subject Of The SEC's Action**

APS has not demonstrated any interest in the receivership estate or to subject of the SEC's Action. Accordingly, it may not intervene in this Action.

**B. APS's Interests Are Not Impaired Or Impeded**

Fed. R. Civ. P. 24(a)(2) requires a party seeking to intervene in litigation "to demonstrate that the disposition of this action may as a practical matter impair or impede their ability to protect their interest."<sup>25</sup> To meet this test, the party attempting to intervene must show that

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<sup>22</sup> See *Hill v. Kan. Gas Serv. Co.*, 203 F.R.D. 631, 634 (D. Kan. 2001) (stating that the court can deny a motion to intervene for failure to attach a pleading).

<sup>23</sup> *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10<sup>th</sup> Cir. 2005).

<sup>24</sup> *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Serv.*, 736 F.2d 384, 386 (7<sup>th</sup> Cir. 1984).

<sup>25</sup> *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10<sup>th</sup> Cir. 2001).

“impairment of its substantial legal interest is possible if intervention is denied.”<sup>26</sup>

Here, APS has not demonstrated how its interests have been impacted by the IRA Information Posting in light of the fact that the IRA Information Posting did not identify APS in any way. Unless APS alleges that it is an IRA custodian which charges “extremely high fees,” and threatens investors, APS cannot allege that the IRA Information Posting attacked it. Further, APS’s self-serving attempt to take up the torch for investors by repeatedly attempting to deprive them of information is entirely illogical and violates the prohibition on third party standing as described below. The Receiver maintains his website to inform investors and other parties-in-interest of the nature of proceedings and to answer questions posed by such parties, which are always qualified and presented as alternatives that such parties may want to explore and not given in the form of legal advice.

In fact, although he has not provided legal advice to investors and not identified APS in any way, the Receiver has twice taken remedial measures to placate APS, but APS has continued to move the bar by making increasingly more intrusive demands. Although the Motion does not state what relief APS seeks through intervention, it is apparent based on APS’s prior conduct that it seeks some form of veto power over the content on the Receiver’s website. Intervention for this purpose is inappropriate and should not be countenanced by the Court.

### **III. APS Does Not Have Standing To Assert Investors’ Rights**

In general a party may not claim standing to vindicate the rights of a third party.<sup>27</sup> The Supreme Court has recognized exceptions to the prohibition on third-party standing,<sup>28</sup> but none

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<sup>26</sup> *Id.*

<sup>27</sup> *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

<sup>28</sup> *See Powers v. Ohio*, 499 U.S. 400, 411 (1991) (recognizing third party standing where (1) the litigant has suffered an injury in fact giving him or her a sufficiently concrete interest in the outcome of the dispute, (2) the



apply to APS's attempted intervention to protect investors.<sup>29</sup> Accordingly, APS's Motion must be judged solely on the merits of APS's intervention pursuant to Fed. R. Civ. P. 24(a)(2).

**IV. Section 21(g) Of The Exchange Act Bars APS's Intervention**

The Motion is barred by Section 21(g) of the Exchange Act, which provides:

Notwithstanding the provisions of section 1407(a) of Title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.<sup>30</sup>

The Motion fails to address why intervention should be allowed in light of Section 21(g) of the Exchange Act. Accordingly, the Motion should be denied.

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litigant has a close relation to the third party, and (3) there exists some hindrance to the third parties ability to protect his or her own interests).

<sup>29</sup> See Motion at pp. 2-3.

<sup>30</sup> Exchange Act Section 21(g).

**CONCLUSION**

Because APS: (a) has not complied with the requirements of Fed. R. Civ. P. 24(c); (b) cannot demonstrate that it meets the requirements for intervention; (c) lacks standing to assert any rights held by investors; and (d) has not demonstrated why its intervention should be allowed in light of Section 21(g) of the Exchange Act, the Court should deny APS's Motion in all respects.

DATED this 22nd day of January, 2013.

**DORSEY & WHITNEY LLP**

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*Attorneys for Receiver*

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the above RECEIVER'S MEMORANDUM  
IN OPPOSITION TO MOTION TO INTERVENE was served via email on this 22nd day of  
January, 2013 on the following:

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