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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.	RECEIVER'S THIRD MOTION SEEKING AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS AND MEMORANDUM IN SUPPORT 2:12-cv-00591 BSJ The Honorable Bruce S. Jenkins
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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 of record, hereby files this motion (the "Motion"), and respectfully requests that the Court authorize him to sell certain real property of the Receivership Estate, described more fully and defined in the Memorandum in Support as "Elkhorn Ridge Lot #1."

The Court previously approved the sale of Elkhorn Ridge Lot #1 for a price of \$143,000.00. See February 5, 2013 Court Order [Docket No. 144]. However, that sale cannot be completed because the purchaser terminated his purchase agreement with the Receiver. The

Receiver, however, contacted the original bidder on the property, who had remained as a backup bidder and who has agreed to purchase Elkhorn Ridge Log #1 for his original bid price of \$130,000. The Receiver submits this Motion asking the Court approve this sale. The terms and conditions of this sale are no different from the sale that the Court has already approved, with the one exception that the purchase price is \$130,000.00, rather than \$143,000.00. For the reasons set forth in the Memorandum in Support below, the Receiver hereby requests that the Court grant this Motion and authorize him to sell the Property as proposed.

This Motion is supported by the Declaration of Receiver R. Wayne Klein (the "Receiver Declaration"), which has been filed concurrently herewith.

A proposed Order is submitted herewith.

MEMORANDUM IN SUPPORT

I.

FACTUAL BACKGROUND

1. On June 25, 2011, the above-captioned case was commenced by the Securities and Exchange Commission (the "SEC") against Defendants National Note of Utah, LC ("NNU") and Wayne LaMar Palmer ("Palmer") (collectively, the "Receivership Defendants"), and in conjunction therewith the Court entered, in relevant part, an Order Appointing Receiver and Staying Litigation (the "Receivership Order").¹ Pursuant to the Receivership Order, the Receiver was appointed, and NNU, forty-one of its affiliated companies, including Elkhorn Ridge, LLC (the "Palmer Entities") (collectively for purposes of this Motion, "NNU"), and all Palmer's assets were placed in the Receiver's control.²

2. The Court has directed and authorized the Receiver to, among other things, do the

¹ Docket No. 9 (Receivership Order).

² See generally, *id.*

following:

- “[L]ocate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.”
- “[S]ell, and transfer clear title to, all real property in the Receivership Estates” upon order of the Court “pursuant to procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004.”³

The Elkhorn Ridge Subdivision and Elkhorn Ridge Lot # 1

3. Relevant to the Motion is certain real property of the Receivership Estate identified as the “Elkhorn Ridge” subdivision, located in Oneida County, near Malad, Idaho. This subdivision contains forty-eight lots that were in process of being developed by National Note of Utah, LC or an affiliated entity (collectively, “NNU”) prior to the Receiver’s appointment. As of the time of the Receiver’s appointment, one of the lots had been sold, but all development efforts had ceased. Roads had been built as well as entrance structures, and cabin construction had started on three of the forty-seven remaining lots (the “Cabin Lots”), but all lot construction on such Cabin Lots that had commenced was unfinished. None of the lots have water or sewer connections, meaning that purchasers of the lots will need to install wells and septic tanks.⁴

4. The Elkhorn Ridge subdivision is subject to certain Covenants, Conditions, and Restrictions (the “CC&R”) that affect the entire subdivision. The CC&R was filed with the Oneida County Recorder on September 17, 2007.⁵

³ Receivership Order at ¶¶ 38-39.

⁴ Receiver Declaration at ¶ 5.

⁵ *Id.* at ¶ 6.

5. The Receiver has considered whether he will amend the CC&R, as previously discussed with the Court at the January 18, 2013 hearing. He has no intention of amending the CC&R. Accordingly, the purchaser of Elkhorn Ridge Lot #1 will acquire the property subject to the CC&R currently on file and recorded with the Oneida County Recorder.⁶

6. The legal description for the property at issue is: "Lot 1, Elkhorn Ridge Estates, according to the official plat thereof as recorded September 17, 2007 in Oneida County, Idaho, Recorder's Office, as instrument number 141595" ("Elkhorn Ridge Lot #1").⁷

7. Elkhorn Ridge Lot # 1 is adjacent to the entrance to the Elkhorn Ridge subdivision. There is an easement that encumbers Elkhorn Ridge Lot #1 to accommodate the subdivision's entrance structure and gate. The easement is included on the Final Plat that was filed with the Oneida County Recorder on September 17, 2007. The purchaser of Elkhorn Ridge Lot #1 will acquire the property subject to this easement.⁸

8. In addition, the Receiver discovered that a pre-condition to the sale of the Elkhorn Ridge lots required the resolution of certain zoning issues with the Oneida County Planning and Zoning Commission (the "Zoning Commission"), including NNU's construction of a fence around the entire subdivision. Until those issues were resolved, no lots could be sold.⁹

9. Accordingly, the Receiver met with the Zoning Commission and requested a variance to allow the sale of one of the lots so as to allow the Receivership Estate to obtain funds sufficient to comply with the zoning issues.¹⁰

10. The Zoning Commission has conditionally granted the variance, allowing one lot

⁶ *Id.* at ¶ 7.

⁷ *Id.* at ¶ 8.

⁸ *Id.* at ¶ 9.

⁹ *Id.* at ¶ 10.

¹⁰ *Id.* at ¶ 11.

to be sold, but prohibiting the sale of any other lots until the perimeter fence is constructed and past due property taxes for the subdivision are paid (the “Subdivision Property Taxes”).¹¹

The Court-Appointed Appraisers

11. On January 7, 2013, a *Motion to Appoint Expert Appraisers* was filed with the Court [Docket No. 113]. The Motion asked the Court to appoint three independent appraisers of Elkhorn Ridge Lot #1.¹²

12. On January 9, 2013, the Court entered an Order approving Jordan Jensen, Val C. Jensen, and Angela Bair as the Court-appointed appraisers of Elkhorn Ridge Lot #1 [Docket No. 116].¹³

13. The Jordan Jensen Appraisal appraised the Elkhorn Ridge Lot #1 for a market value of \$135,000.00. The Val Jensen Appraisal appraised the Elkhorn Ridge Lot #1 for a market value of \$126,000.00. The Angela Bair Appraisal appraised the Elkhorn Ridge Lot #1 for a market value of \$135,000.00. Based upon these three appraisals, the average appraised value of Elkhorn Ridge Lot #1 is \$132,000.00.¹⁴

The Original Purchase Offer

14. On or about October 11, 2012, the Receiver caused certain lots in the Elkhorn Ridge subdivision, including Elkhorn Ridge Lot #1, to be listed for sale through Idaho Real Estate Group. To determine an offering price for the properties in question, the Receiver obtained an appraisal for the property and relied upon the advice of his independent real estate professional.¹⁵

¹¹ *Id.* at ¶ 12.

¹² *Id.* at ¶ 13.

¹³ *Id.* at ¶ 14.

¹⁴ *Id.* at ¶ 15.

¹⁵ *Id.* at ¶ 16.

15. On October 16, 2012, the Receiver received an offer to purchase Elkhorn Ridge Lot #1. The buyer originally offered \$120,000. After some negotiation, the buyer increased his offer to \$130,000, and the Receiver agreed to sell Elkhorn Ridge Lot #1 to the buyer, subject to Court approval of the sale (the “Original Purchase Offer”). The Original Purchase Offer was negotiated by the Receiver with the prospective purchaser in good faith and at arms’ length.¹⁶

Publication Notice

16. On November 29, 2012, an *Ex Parte Motion For Order Approving Method and Form of Publication Notice of Sale of Real Properties* (the “Notice Motion”) was filed with the Court, seeking approval of the method and form of proposed publication notice.¹⁷

17. On December 12, 2012, the Court entered an Order granting the Notice Motion and approving the form of the publication notice required under 28 U.S.C. § 2001(b) (the “Court-Approved Notice”).¹⁸

18. On December 20, 2012, the Receiver caused the Court-Approved Notice to be published in the Idaho Enterprise.¹⁹

The Second Purchase Offer

19. On or about December 21, 2012, the Receiver received a better offer than the Original Purchase Offer. Specifically, he received an offer of \$143,000.00 to purchase Elkhorn Ridge Lot #1. He accepted this offer pending Court-Approval (the “Second Purchase Offer”).²⁰

20. Hearings were held on January 4 and January 18, 2013 on the motion asking the Court to approve the sale of Elkhorn Ridge Lot #1, pursuant to the terms of the Second Purchase

¹⁶ *Id.* at ¶ 17.

¹⁷ *Id.* at ¶ 18.

¹⁸ *Id.* at ¶ 19.

¹⁹ *Id.* at ¶ 20.

²⁰ *Id.* at ¶ 21.

Offer.²¹

21. On February 5, 2013, the Court entered an Order approving the sale of Elkhorn Ridge Lot #1, pursuant to the terms of the Second Purchase Offer.²²

22. In the meantime, the buyer who had extended the Second Purchase Offer informed the Receiver that it intended to terminate the Second Purchase Offer. The Receiver and his broker attempted to convince the buyer not to terminate, but the buyer terminated the Second Purchase Offer.²³

Back To the Original Purchase Offer

23. The Receiver contacted the buyer who had extended the Original Purchase Offer and inquired whether he was still interested in purchasing the property subject to the terms of the Original Purchase Offer. The buyer was still interested and he entered into an addendum to the original real estate purchase contract, pursuant to which he agreed that he would purchase Elkhorn Ridge Lot #1 for \$130,000.00.²⁴

24. If the Court approves the sale pursuant to the terms of the Original Purchase Offer, the Receiver anticipates paying ordinary costs of sale, including market-rate closing costs and a standard 6.90 % realtor commission at the time of closing of the sale.²⁵

25. Any interests against Elkhorn Ridge Lot #1, other than the closing costs and the Subdivision Property Taxes, will not be paid at the time of closing of the sale. Rather, any such interests (to the extent that they exist and without any waiver of the Receiver or the Receivership's rights and defenses related thereto) will survive the sale and will attach to the

²¹ *Id.* at ¶ 22.

²² *Id.* at ¶ 23.

²³ *Id.* at ¶ 24.

²⁴ *Id.* at ¶ 25.

²⁵ *Id.* at ¶ 26.

“Net Sale Proceeds,” defined as the sale proceeds minus closing costs and the Subdivision Property Taxes.²⁶

26. The Receiver will separately account for the Net Sale Proceeds pending resolution of any disputes related to interests that may exist against Elkhorn Ridge Lot #1.²⁷

Free and Clear Sale

27. With the exception of the CC&R and the Easement described above in paragraphs 6-9, the Receiver proposes to sell Elkhorn Ridge Lot #1 free and clear of all interests therein, with any interests that may exist attaching to the Net Sale Proceeds.²⁸ In so doing, the Receiver is not in any way waiving any rights, claims, interests or defenses to any claims or interests made against Elkhorn Ridge Lot #1 or to the Net Sale Proceeds.²⁹

28. To determine interests, if any against Elkhorn Ridge Lot #1, the Receiver obtained a preliminary title report with respect to this property.³⁰

29. According to the Title Report, the following exceptions to title exist: (a) property taxes in the total principal amount of \$218.54 for 2010-2011, with 2012 showing as due and owing as well; (b) a Deed of Trust, recorded by Entity Elkhorn Ridge, LLC, a NNU affiliate which is one of the Palmer Entities included in the Receivership Order (the “Insider Deed of Trust”); (c) an “Assignment of Beneficial Interest in Trust Deed for Security” (“ABI”) issued to investors Sherman and Carla Mehlhoff (“Mehlhoffs”), purporting to provide the Mehlhoffs a beneficial interest in the Insider Deed of Trust to secure their investment with NNU; and (d) an

²⁶ *Id.* at ¶ 27.

²⁷ *Id.* at ¶ 28.

²⁸ As explained in paragraph 25 above, the Receiver will also pay the Subdivision Property Taxes from the sale proceeds.

²⁹ *Id.* at ¶ 29.

³⁰ *Id.* at ¶ 30.

ABI issued to investor Peter Moritz ("Moritz"), purporting to provide Moritz a beneficial interest in the Insider Deed of Trust to secure his investment with NNU.³¹

30. These ABI interests are not valid, but to the extent that they continue to be asserted, the Receiver proposes that the sale be allowed with any interest that may exist pursuant to such ABIs, attaching to the Net Sale Proceeds thereof.³²

31. According to the records in the Receiver's control, Moritz's promissory note has been paid in full, and Moritz has informed the Receiver that he will execute a release of his ABI and not claim an interest in Elkhorn Ridge Lot #1 or the Net Sale Proceeds thereof.³³

32. Mehlhoff's ABI was issued in conjunction with a December 2005 NNU promissory note. Like the Moritz ABI, according to records in the Receiver's control, there is no basis for Mehlhoff's ABI because his promissory note was paid in full in July 2007. The Receiver has requested that Mehlhoff agree to release his ABI, but as of this time, Mehlhoff has not done so. But, based on these facts, as well as issues related to the legal validity of any ABI, the Receiver does not believe that Mehlhoff has any interest in the Elkhorn Ridge Lot #1 or to the Net Sale Proceeds thereof. Nonetheless, to facilitate the proposed sale, the Receiver agrees to allow Mehlhoff's alleged interest to attach to the Net Sale Proceeds until such time as any disputes can be resolved.³⁴

Best Interests

33. The sale of Elkhorn Ridge Lot # 1 as proposed is beneficial for and in the best interests of the Receivership Estate.³⁵

³¹ *Id.* at ¶ 31.

³² *Id.* at ¶ 32.

³³ *Id.* at ¶ 33.

³⁴ *Id.* at ¶ 34.

³⁵ *Id.* at ¶ 35.

34. The proposed sale will result in cash based on the fair market value of Elkhorn Ridge Lot #1. The average appraised value of Elkhorn Ridge Lot #1 is \$132,000. Thus, the purchase price of \$130,000 is 98.5% of the appraised value of Elkhorn Ridge Lot #1.³⁶

35. The sale of Elkhorn Ridge Lot #1 as proposed will result in the completion of one cabin and establish residency in the subdivision, which it is hoped in turn will facilitate the sale of the other forty-six lots. It is anticipated that there will be a boost in sales of the other lots in the subdivision and reduce the chance of vandalism on the remaining property that is being marketed by the Receivership Estate.³⁷

36. Sale of Elkhorn Ridge Lot #1 will slightly reduce the burden to the Receivership Estate by reducing the time spent by the Receiver in managing the lot, as well.³⁸

III.

ARGUMENT

Based on the facts above, the Receiver respectfully requests authorization to sell Elkhorn Ridge Lot #1 pursuant to the terms of the Original Purchase Offer free and clear of liens and interests, with any such interests, to the extent that they exist, attaching to the Net Sale Proceeds and held by the Receiver pending resolution of any disputes related thereto. Sale of Elkhorn Ridge Lot #1 as proposed is within the scope of the Receiver's authority under the Receivership Order as quoted above and 28 U.S.C. § 2001(b), it is in the best interests of the Receivership Estate, and the sale serves the purposes of the receivership by providing a "realization of the true and proper value" of Elkhorn Ridge Lot #1.³⁹

³⁶ *Id.* at ¶ 36.

³⁷ *Id.* at ¶ 37.

³⁸ *Id.* at ¶ 38.

³⁹ Receivership Order ¶ 38.

Sale of Elkhorn Ridge Lot #1 as Proposed is Beneficial to the Receivership Estate

Section 2001(b) of title 28 of the United States Code provides that the Court may authorize the sale of real property through private sale if such sale is in the “best interests” of the Receivership Estate. Furthermore, the Receivership Order authorizes the Receiver, subject to Court approval, to sell property of the Receivership Estate “with due regard to the realization of the true and proper value of such Receivership Property.” Sale of the Elkhorn Ridge Lot #1 as proposed herein is in the best interests of the Receivership Estate for several reasons, including at least the following.

First, the sale will result in cash for the Receivership Estate based on the fair market value of Elkhorn Ridge Lot #1. Elkhorn Ridge Lot #1 was appraised by three separate court-appointed appraisers. These appraisers each independently appraised the property and their appraisals came in at \$135,000.00, \$126,000.00, and \$135,000.00, for an average appraised value of \$132,000. These appraisals have taken into consideration current market conditions, sales of comparable properties, and the particular nature of the properties. The property will be sold for \$130,000 which is 98.48 % of the average appraised value.

Second, the proposed sale will result in the completion of one cabin and establish residency in the subdivision, which it is hoped in turn will facilitate the sale of the other forty-seven lots. It is anticipated that there will be a boost in sales of the other lots in the subdivision and reduce the chance of vandalism on the remaining property that is being marketed by the Receivership Estate.

Third, the proposed sale will provide sufficient proceeds to satisfy conditions set by the Zoning Commission for final approval of the subdivision, thus allowing the Receiver to proceed

with marketing and selling the forty-seven additional lots in the subdivision.

Fourth, the sale of Elkhorn Ridge Lot #1 as proposed will reduce, albeit slightly, the burden on the Receivership Estate. The Receiver will no longer have to spend time managing the property, and the Receivership Estate will no longer have obligations related to paying taxes on and other maintenance and upkeep expenses related to the property.

Finally, the Court has already approved of a sale of Elkhorn Ridge Lot #1 under terms identical to those proposed in this Motion, with the exception of the purchase price. The Court previously approved a sale at a price of \$143,000.00. This Motion asks the Court to approve the sale at a price of \$130,000.00. Other than this difference the sales are the same and subject to the same conditions. Moreover, as explained above, the \$130,000.00 sale price nearly equals the average appraised value. Accordingly, the Receiver requests that the Court approve this sale under the terms outlined herein.

Request To Sell Elkhorn Ridge Lot #1 Free and Clear of Interests

As discussed above, the Receiver proposes to sell Elkhorn Ridge Lot #1 free and clear of any interests in the property, with any such interest attaching to the Net Sale Proceeds. The Court may order such a sale so long as parties with interests against the property are given proper notice.

At this time, there do not appear to be any valid interests against the property, but those who potentially could be deemed to have an interest, specifically Moritz and Mehlhoff, will be served with the Motion to be given notice of the relief sought therein. Failure to object to these terms, will mean that the purported holders of interests consent to the relief sought herein, and that they may only look to the Net Sale Proceeds for any claim that they may eventually be held to have. Importantly, Moritz and Mehlhoff were served with the prior motions asking this Court to approve the sale of Elkhorn Ridge Lot #1 and did not serve any objection to the motions. In

fact, the procedure outlined in this motion and the Receiver's prior motions will allow for the proposed sale to close, and preserve the status quo as to any disputes as to the validity of any ABI or other interest in Elkhorn Ridge Lot #1.

Compliance With 28 U.S.C § 2001

The Receivership Order provides that the Court may require that the proposed sale of real property satisfy 28 U.S.C. § 2001.⁴⁰ Subsection (b) of § 2001 permits, with Court approval, a private sale of receivership property as proposed herein, but it conditions such sale on (1) obtaining a purchase price that is no less than two-thirds of the appraised value of the property; (2) appointing "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[;]" (3) publication notice of the sale "at least ten days before confirmation[;]" and (4) cancellation of the sale "if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale."⁴¹ Here, the Receiver has complied with each of these factors.

Specifically, factor (1) is met in this case inasmuch as the purchase price for Elkhorn Lot #1 is 98.48% of the appraised value, and therefore far exceeds the 2/3 requirement.

Factor (2) is met because the Receiver has obtained appraisals of Elkhorn Ridge Lot #1 from three experienced, third party appraisors, who were appointed by this Court.

Factor (3) has been met as the Receiver published notice of the proposed sale immediately upon the Court's entry of an Order approving the method and form of such notice.

Factor (4) also has been met, inasmuch as the Receiver understands that the sale will not be approved if he receives a higher and better offer that is in compliance with § 2001(b) as

⁴⁰ Receivership Order ¶ 39.

⁴¹ 28 U.S.C. § 2001(b).

quoted above and the sale is conditioned on this factor.

CONCLUSION

For the foregoing reasons, the Receiver requests that the Court grant the Motion, thus authorizing the sale of Elkhorn Ridge Lot #1 pursuant to the Original Purchase Offer free and clear of purported interests.

DATED this 7th day of February, 2013.

DORSEY & WHITNEY LLP

/s/ Chris Martinez

Peggy Hunt

Chris Martinez

Jeffrey M. Armington

Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S THIRD MOTION SEEKING AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS AND MEMORANDUM IN SUPPORT** was filed with the Court on this 7th day of February, 2013, and served via ECF on all parties who have requested notice in this case and was served via email on this 7th day of February, 2013 on the following:

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Attorneys for Defendant Wayne Palmer

/s/ Chris Martinez

Furthermore, I certify that on the 7th day of February, 2013, the **RECEIVER'S THIRD MOTION SEEKING AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS AND MEMORANDUM IN SUPPORT** was served on the following parties by U.S. Mail postage prepaid:

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/s/ Chris Martinez