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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.	**JOINT MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE** 2:12-cv-00591 BSJ Judge Bruce S. Jenkins

The Securities and Exchange Commission (the "SEC") and R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of National Note of Utah, LC ("National Note"), affiliated entities, and the assets of Wayne LaMar Palmer ("Palmer"), by and through their respective

counsel, hereby file this opposition to the Motion to Intervene (the "Motion")[1] filed by the self-styled "National Note Investor Committee" or "Investor Committee." In support hereof and filed concurrently herewith the Receiver has filed his *Declaration* (the "Receiver Declaration").

INTRODUCTION

This case involves civil enforcement of securities laws related to what is alleged to be an enterprise operated by Palmer as a Ponzi scheme that took in at least $100 million from investors through National Note's issuance of promissory notes. All but approximately 170 investors have lost their principal investment.[2] Many of the victims of this scheme were not only duped by the promise of profits, but were issued "Assignments of Beneficial Interests," through which investors were led to believe that they were obtaining some type of secured interest in property (the "ABIs"). The Receiver has determined that these ABIs are legally invalid, and he has requested that investors holding ABIs release them. This has been successful in some instances, and where it has not, the Receiver has and will continue to be forced to sue the ABI holders. Invalidation of the ABIs is important to allow for a *pro rata* distribution of receivership assets to all victims---not to those relatively few who demanded or were given ABIs (or, in some instances, to those investors who received ABIs and actually profited from the scheme).

Presently, a conflicted group of select investors (comprised of non ABI holders and holders of ABIs), seeks to intervene in this case, after the close of discovery, for a very vague purpose, but which generally, appears to be to question the business judgment of the Receiver—the person who has been appointed as a fiduciary for the benefit of *all* investors. From the information provided to the Receiver to date, as well as what is disclosed in the Motion, the basis

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1 Docket No. 352.

2 The Receiver has made demand on and/or commenced suit against many of those investors who received more than their principal investment or "false profits."

for the formation and governance of this self-proclaimed, conflicted "Investor Committee" is unknown. In fact, the Receiver has been presented with some indication that at least some members of the Investor Committee still believe in and are relying on information provided by Defendant Palmer. By allowing intervention, the Court will give instant credibility to this so-called "Investor Committee" whose motives are conflicted and unknown.

The Investor Committee appears to be using its apparent discontent with the Receiver's recent renewed motion to approve an agreement with Barclay Associates, LLC ("Barclay") to afford it standing to intervene in this case for a very undefined purpose. That motion relates to a relinquishment/conveyance of real property located in Middleton, Idaho (the "Middleton Property") that lacks equity for the Receivership Estate (the "Middleton Motion").[3] Yet, as admitted at a hearing on the Receiver's Middleton Motion, the Investor Committee does not have a discrete interest in the disposition of the Middleton Property. Using the Middleton Motion—a matter over which the Court has indicated a concern about the Investor Committee's standing—the Investor Committee now seeks to intervene for an unknown purpose.

In short, it appears that the present Motion is a guise for an attempted broader intervention not based on any specific property in the Receivership Estate, but to allow the self-proclaimed Investor Committee to take a stand against the Receiver's actions when he is allegedly "favor[ing] one creditor over others in the disposition of assets"[4] and for other undefined purposes. The favoritism allegations are serious and patently false, and most relevant

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[3] *See* Docket No. 339. An initial hearing was held on this renewed Motion on July 3, 2013, at which time the Court requested that the Receiver obtain a separate appraisal of value of the Middleton Property. The Court has appointed an appraiser for the Middleton Property, and the Receiver will obtain a separate appraisal. Docket No. 376. Based on his investigation to date, the Receiver is confident that there is no equity in the Middleton Property for the benefit of the Receivership Estate.

[4] Investor Committee's Motion, p. 4. This allegation is expressly rejected by the Receiver—and it should be taken as that—a mere allegation by a group whose motives may be to serve individual interests—not those of the investor-victims as a whole whose interests the Receiver has a duty to protect.

hereto, based on irresponsible statements that lack any supporting evidence.[5] Indeed, the Investor Committee has not filed a complaint in intervention as required under Federal Rule of Civil Procedure 24(c), and the basis and relief sought in any such complaint has not been defined—nor can it be defined based on the relief sought in the Motion—complaints cannot be used to raise general complaints about the administration of a Receivership Estate by a group whose members are conflicted and have no legal standing.

Here, the Receiver has been appointed to and is serving as a fiduciary for the benefit of all victims of this alleged scheme. In that role, he frequently has provided substantial information requested by the Investor Committee and certain individual members, and had multiple meetings with counsel for the Investor Committee and certain individual members. Also, notices of all requests for relief are provided to the Investor Committee through its counsel that has entered an appearance thus entitling it electronic notice. All members of the Investor Committee and its counsel can also keep abreast of developments in the case, including all property dispositions, by checking the website maintained by the Receiver. The fact that certain members of the Investor Committee may not agree with all the Receiver's decisions is not a basis for general intervention that is not based on any particular property in the Receivership Estate. Allowing the broad and unsupported intervention requested here would establish a very dangerous and costly precedent in equity receivership cases. There is neither a basis for nor any

[5] The mere fact that the Investor Committee alleges that the Receiver is favoring secured creditors shows that at least some of its members may be aligned to the false promises that have been and may continue to be made by Palmer. The Middleton Property has no equity, and members of the Investor Committee who believe that a profit can be made from the Middleton Property either do not understand or cannot understand the realities of the existence of a valid lien against the Property the debt for which far exceeds the value of the Property. While it is plausible profits may eventually be had if the Middleton Property is developed, no person has agreed to pay a sum for the Property that exceeds the secured debt against it. *See infra* ¶ 5. More importantly, as this Court has noted in this case in the past, the Receiver cannot engage in speculative real estate development, and based on the realities of the relatively paltry assets available to try to make victims of this scheme whole, he does not have the funds to do so.

practical reason to grant the Motion and, thus, it is respectfully requested that it be denied.

BACKGROUND

1. On June 25, 2011, the above-captioned case was commenced by the SEC against Defendants National Note and Palmer, and in conjunction therewith the Court entered, in relevant part, an *Order Appointing Receiver and Staying Litigation* (the "Receivership Order").[6] Pursuant to the Receivership Order, the Receiver was appointed, and National Note and at least forty-one of its affiliated companies (collectively for purposes of this Motion, "NNU" or "National Note"), and all Palmer's assets were placed in the Receiver's control.[7]

2. As early as August 2012, counsel for the Investor Committee contacted the Receiver to inquire about different aspects of administration of the Receivership Estate. From the outset, the Receiver expressed concern about (a) the interests being served by the Investor Committee, (b) the identity of the members of the Investor Committee and their motives, and (c) the inability of investors holding ABIs to be jointly represented by counsel who is also representing the interests of those investors who do not hold ABIs. The Receiver was informed that to the extent that members of the Investor Committee held and were seeking enforcement of ABIs, they would not be members of the Investor Committee.[8]

3. The Receiver has never been provided with any information from which he could discern the terms of the Investor Committee's engagement of counsel, or the basis for their governance, such as bylaws or any other governance documents.[9]

4. In an effort to comply with his duties, the Receiver determined that he would, despite his concerns about the Investor Committee, communicate with it and provide it

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6 Docket No. 9 (Receivership Order).
7 *See generally, id.*
8 Receiver Declaration ¶ 4.
9 Receiver Declaration ¶ 5.

information about assets of the Receivership Estate as deemed reasonable and appropriate, taking into consideration his duties to all investors. Communication between the Receiver, counsel to the Investor Committee and, in certain instances, individual members of the Investor Committee, with the consent of Investor Committee counsel, has been frequent and ongoing. The Receiver has provided information about various matters to Committee counsel and its members when requested.[10]

5. Based on his investigation to date, the Receiver has determined that there is no equity in the Middleton Property. The basis for this determination is set forth in the initial Middleton Motion[11] and the renewed Middleton Motion,[12] both of which are supported by the Receiver's Declarations in support.[13] All of these documents are incorporated herein by this reference. In short, however, through the Middleton Motion, the Receiver has requested authority to enter into an agreement with Barclay, an entity that holds a valid and enforceable lien against the Middleton Property and who holds a claim against NNU that is secured by a lien that far exceeds the appraised value of the Middleton Property. Under the material terms of the proposed agreement, the Receiver will convey the Middleton Property to Barclay and Barclay will release any and all claims that it has against NNU and the Receivership Estate.[14]

6. As set forth in the Receiver's Declarations in support of the Middleton Motion, all

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[10] Receiver Declaration ¶ 6.

[11] Docket No. 278. The Court denied the initial Middleton Motion because of its concern that the Receiver had agreed to abandon the Middleton Property to Barclay. The Court indicated that the agreement in question should be modified to convey the Middleton Property, not abandon it. *See* Docket No. 337.

[12] Docket No. 339. Under the renewed Middleton Motion, the Receiver presented a modified agreement for approval conveying, not abandoning, the Middleton Property to Barclay due to lack of equity. *See supra* n. 11.

[13] Docket Nos. 279 & 340.

[14] *See* Docket No. 340, Exh. G (Agreement).

of his negotiations with Barclay have been at arms' length and in good faith.[15]

7. As part of this communications with the Investor Committee and its members discussed above, the Receiver has expressed to them his opinion regarding the Middleton Property and the lack of equity in that Property for the Receivership Estate. Furthermore, he provided an appraisal for the Middleton Property, valuing the Property at $1 million, to certain members of the Investor Committee.[16] Some members of the Investor Committee communicated further with the Receiver and, upon information and belief, independently with Barclay about Middleton Property. These individuals expressed frustration that a property, touted to be worth $35 million prior to the Receiver's appointment, had no value for the Receivership Estate.[17] The Receiver indicated to members of the Investor Committee independently and in a meeting attended by their counsel that if they believed that there was profit to be had from the development of the Middleton Property, they should attempt do that, but that he should not engage in real estate development. These individuals expressed an intention to attempt to obtain and develop the Middleton Property. To date, the Receiver is informed that this has not occurred.[18]

8. On July 2, 2013, the day before the Court's hearing on the Receiver's renewed Middleton Motion,[19] the Investor Committee filed its present Motion.[20]

9. Also on July 2, 2013, one day prior to a hearing on the Middleton Motion, the Investor Committee filed an *Objection* to the Receiver's renewed Middleton Motion (the

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15 Docket Nos. 279 & 340 (Declarations).
16 Receiver Declaration ¶ 7; Docket No. 340, Exh. D (Appraisal).
17 Receiver Declaration ¶ 8.
18 Receiver Declaration ¶ 9.
19 Docket Nos. 339 & 347.
20 Docket No. 352.

"Committee Objection").[21] The Committee Objection is not supported by any evidence, much less evidence or allegations disputing that the Receiver's agreement with Barclay, which is the subject of the Middleton Motion, was made other than at arms' length or in good faith.

10. At the July 3, 2013 hearing on the renewed Middleton Motion, upon this Court's inquiry, counsel to the Investor Committee confirmed that none of the members of the Committee hold any security interest in the Middleton Property that is the subject of the Receiver's Middleton Motion.

11. Upon review of Exhibit A to the Investor Committee's present Motion, the Receiver has determined that of the 54 members of the Investor Committee, at least 3 hold one or more ABIs in properties in the Receivership Estate.[22] One, John Spinola, has been sued by the Receiver because he claims a lien against real property known as the "Kanab Cabin." There may be additional ABI holders in properties where the Receiver has not yet ordered title reports.[23] Most if not all of the ABI holders on the Investor Committee have received a formal request from the Receiver to voluntarily release their ABIs. Although counsel for the Investor Committee has worked with the Receiver to get specific ABIs released when requested, many holders have not voluntarily released their ABIs as requested by the Receiver.[24]

12. One Investor Committee member had requested that the Receiver "hang on to the property" to allow development of the Middleton Property "in a joint venture" or a "develop ready project." Thus, it appears that at least one Committee member would like to prevent the Receiver's settlement with Barclay, to enable the Committee member to work with a joint

[21] Docket No. 353.
[22] Receiver Declaration ¶ 10.
[23] Receiver Declaration ¶ 11.
[24] Receiver Declaration ¶ 12.

venture to develop the Middleton Property to the private benefit of others.[25]

ARGUMENT

I. No Investor Committee Member Has A Discrete Interest In the Middleton Property.

The Investor Committee seeks to intervene as a matter of right in this case for some undefined purpose, stating that it "only recently became aware of the potential abandonment" of the Middleton Property, "but [that it] continue[s] to have an interest in the Middleton Property and other assets which have not been marshaled . . . ."[26] No evidence is presented in support of this statement (nor could it be because it is not based on the actual facts established by the evidence set forth above), and it is contrary to the very statements made by the Committee's counsel at the July 3rd hearing on the Middleton Motion—where he admitted that none of the Investor Committee members have any connection to the disposition of the Middleton Property other than their connection to this case as National Note investors.[27] Accordingly, having no interest in any particular property and, as the Court recognized at the July 3rd hearing, having interests that should be aligned with the duties of the Receiver to maximize estate value, the Investor Committee lacks standing regarding the Receiver's agreement with Barclay or otherwise.

Note that Barclay is not "similarly situated" with investors as claimed by the Investor Committee at pages 3-4 of its Motion. If the Middleton Motion is denied, Barclay, as a holder of a valid lien against the Middleton Property (unlike the members of the Investor Committee), would have standing to intervene and ask for relief from the asset freeze and stay that has been imposed by the Receivership Order in this case. Based on the information known to the

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[25] Receiver Declaration ¶ 13.

[26] Investor Committee Motion, p. 4.

[27] *See supra* ¶ 10.

Receiver at this time, Barclay would be granted relief.[28] Yet, the Receivership Estate would not obtain the benefit of the releases proposed in the agreement with Barclay and the Receivership Estate would incur not insignificant expenses all of which would conflict with the interests of investors, including members of the Investor Committee. The fact that Barclay is not a regulated financial institution as alleged by the Investor Committee and that it expected payment with interest,[29] does not strip it of its standing as a secured creditor with an identifiable interest in collateral that it obtained in accordance with law.[30] Barclay is not, as stated by the Investor Committee, similarly situated with investors—unlike investors, it obtained a valid and enforceable lien against the Middleton Property which cannot be ignored.

There is a concern that the Investor Committee is being used as a platform for those investors who still want to believe in National Note and the illusory vision that was promised by Palmer, and as a result, who would like the Receiver to make decisions that are contrary to his duties to all investors.[31] For instance, as discussed in the Receiver's Declaration and summarized above, one member of the Investor Committee contacted the Receiver and asked him to "hang on to the property" to allow development of the Middleton Property "in a joint venture" or a "develop ready project." Obviously, in a reasonable exercise of his duties, the

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28 Receiver Declaration ¶ 14.

29 Investor Committee's Motion, pp. 3-4.

30 This Court has previously authorized the Receiver to relinquish real property to investor parties who are not financial institutions, but which had a valid deed of trust. *See* Docket No. 125. Under that approved settlement agreement, the Receiver transferred ownership of a parcel of property, appraised at $115,000, to Rhonda Pilcher, Barry Pilcher, and Commercial Design & Construction, Inc. (collectively, the "Pilchers"), because the Pilchers had a valid deed of trust secured by the property and were owed over $293,000 in unpaid promissory notes. *See* Docket No. 123. The Receiver's settlement with the Pilchers is strongly similar to the proposed settlement with Barclay – the Receiver is seeking to convey the Receivership Estate's interest in property which is secured by a valid deed of trust in exchange for Barclay's release of any deficiency claims. The fact that the Pilchers and Barclay are not "regulated financial institutions" is immaterial, because both held valid deeds of trust – something that the Investor Committee chooses to ignore entirely.

31 Receiver Declaration ¶ 15.

Receiver should not engage in property development or "hang on" to property that is burdensome to the Receivership Estate to meet the demands of a single investor or a small group of investors who are holding out hope that they may be able to put together a joint venture over time.

II. The Committee Fails To Meet The Requirements For Intervention Under Fed. R. Civ. P. 24(a)(2).

The Investor Committee seeks to intervene as a "matter of right."[32] Intervention as a matter of right is provided for in Federal Rule of Civil Procedure 24(a). Rule 24(a)(2), which is relevant here, and the Court of Appeals for the Tenth Circuit describe the four requirements for intervention as a matter of right 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.[33]

"Failure to satisfy even one of these requirements is sufficient to warrant denial of a motion to intervene as a matter of right."[34] Here, none of the four factors are met for the reasons set forth below.

A. The Motion Is Untimely

When an applicant seeks to intervene as of right under Rule 24(a), "[t]imeliness is the threshold consideration."[35] "The standard governing timeliness is 'the length of time the applicant knew or should have known of his interest before making the motion.'"[36]

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[32] Investor Committee Motion, p. 4.

[33] *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

[34] *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Serv.*, 736 F.2d 384, 386 (7th Cir. 1984).

[35] *Republic of the Phil. v. Christie's*, 2000 U.S. Dist. LEXIS 10635, *6 (S.D.N.Y. 2000) (emphasis added).

[36] *Id.* at *7 (citing *U.S. v. New York*, 820 F.2d 554, 557 (2d Cir. 1987) (emphasis added)).

In this case, the Receiver was appointed in June 2012, and has continuously communicated with the Investor Committee since August 2012.[37] Early in his conversations with the Investor Committee, the Receiver expressed concerns about the lack of equity in the Middleton Property. The initial Middleton Motion was filed in April 2013 and the hearing on the initial Middleton Motion was held on May 31, 2013. At that time, the Investor Committee raised no objection to the relief sought therein. The Investor Committee waited until the day before the hearing on the renewed Middleton Motion – more than one year after this case was commenced and 11 months after opening a dialogue with the Receiver – to file its intervention Motion with regard to property, which it admitted the next day it had no interest in. Simply put, the Motion is neither timely nor appropriate, and should be denied.

B. Interests Are Not Established, Much Less Impaired Or Impeded

Rule 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."[38] To meet this test, the party attempting to intervene must show that "impairment of its substantial legal interest is possible if intervention is denied."[39]

Here, the Investor Committee has not established any interest, and in fact, has admitted no interest in the Middleton Property. Thus, it cannot establish that its legal interests are impaired or impeded and its motion must be denied.

"A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant."[40] As stated by

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37 Receiver Declaration ¶ 4.

38 *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

39 *Id.*

40 *SEC v. Wing*, 599 F.3d 1189, 1196 (10th Cir. 2010) (quoting *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005)).

the Court of Appeals for the Tenth Circuit:

> [I]n a case involving a Ponzi scheme, the interests of the Receiver are very broad and include not only the protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy.[41]

The Receivership Estate should not be subject to piecemeal challenges by investors pursuing individual agendas at the expense of the collective body of creditors and investors whose interests are represented by the Receiver. The Tenth Circuit has echoed this view in *Commodity Futures Trading Comm's v. Chilcott Portfolio Mgmt., Inc.*,[42] where it affirmed the District Court's denial of an investor's attempt to intervene in an action where a receiver had been appointed. In *Chilcott* the Tenth Circuit stated that when a court appoints a receiver to collect, administer, and distribute property, it will make "an order directing creditors to present their claims to the receiver."[43] Individual investors, or a group, should not be allowed to intervene to second guess the Receiver's work at the expense of all other investors.

C. The Receiver Adequately Represents The Committee Members' Interests

A party attempting to intervene must also show that its interests are not adequately represented by existing parties in the litigation.[44] And an applicant for intervention "bears the burden of showing inadequate representation."[45] To determine whether representation is adequate, courts assess the object of the intervenor. In general "representation is adequate when the objective of the applicant for intervention is identical to that of one of the parties."[46] And

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41 *Wing*, 599 F.3d at 1197 (quoting *SEC v. Universal Financial, et al.*, 760 F.2d 1034, 1038 (9th Cir. 1985)).

42 725 F.2d 584 (10th Cir. 1984).

43 *Id.* at 586.

44 *Wild Earth Guardians v. United States Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009).

45 *Clinton*, 255 F.3d at 1254.

46 *San Juan County, Utah v. United States*, 503 F.3d 1163, 1204 (10th Cir. 2007) (internal quotations omitted).

"the intervention test is not met when the applicants present only a difference in strategy."[47]

Here again the Committee fails to carry its burden. Although implied, it has produced *no* evidence, and it cannot produce evidence, to support its false allegation that the Receiver is acting to "favor one creditor over others."[48] Rather, the Committee makes general allegations that blatantly ignore the uncontested fact that Barclay, unlike members of the Committee, holds a valid enforceable lien against the Middleton Property—falsely suggesting that because Barclay is not a regulated financial institution its property rights created under state law should be ignored and that it, like investors, cannot claim an interest in which it obtained a lien.

The Receiver is charged with protecting the investors as a whole.[49] The Receiver's interests in this case are directly aligned with the interests of the investors and his objective is to maximize recovery for those investors. Thus, the Receiver is adequately representing the interests of the Committee members in their capacity as investors. And allowing a conflicted group of investors to intervene in this case will only serve to increase administration costs to the detriment of all parties, including it should be noted—the members of the Investor Committee.

D. Cases Cited By The Investor Committee Do Not Support Intervention

The cases cited by the Investor Committee in support of its ability to intervene are inapplicable to the facts here. First, in *Coalition of AZ/NM Counties for Stable Economic Growth v. DOI*,[50] the Court of Appeals for the Tenth Circuit allowed a commercial wildlife photographer and naturalist to intervene in an action involving a coalition's challenge to the federal government's decision to protect an owl under the Endangered Species Act.[51] In *Elliot*

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47 *SEC v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031, 1042 (C.D. Cal. 2001).
48 Investor Committee's Motion at p. 4.
49 *SEC v. Byers*, 592 F. Supp. 2d 532, 537 (S.D.N.Y. 2008).
50 100 F.3d 837 (10th Cir. 1996).
51 *Id.* at 846.

Indus. v. BP Am. Prod.,[52] the Tenth Circuit allowed four applicants to intervene in a class action dispute over payment of oil and gas royalties "solely to challenge the existence of subject matter jurisdiction over the class."[53] These two cases have no applicability to the instant case, in that the Court recognized that both intervenors had articulated a particular injury that could only be remedied through intervention. In this case, the Investor Committee admitted to the Court that it has no cognizable interest in the Middleton Property at issue.

Finally, in *SEC v. Credit Bancorp, Ltd.*,[54] the Court of Appeals for the Second Circuit affirmed a district court's approval of a receiver's *pro rata* distribution plan in a Ponzi case over the objection of a defrauded creditor who had never acquired a security interest in connection with the value it transferred to the Ponzi scheme.[55] In sum, the Motion cites to only one Ponzi case, *Credit Bancorp*, which has nothing to do with intervention but instead stands for the entirely unsurprising proposition that Ponzi scheme creditors without security interests should receiver a *pro rata* distribution—the very goal the Receiver is hoping to accomplish by his actions in this case.[56]

III. The Committee Fails To Meet The Requirements For Intervention Under Fed. R. Civ. P. 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 parties on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the

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52 407 F.3d 1091 (10th Cir. 2005).
53 *Id.* at 1103.
54 290 F.3d 80 (2d. Cir. 2002).
55 *Id.* at 87, 91.
56 *See id.*

intervenor.[57] This 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)(2) discussed above. Here, even if the Committee Objection to the Receiver's Middleton Motion could somehow construed to be a pleading in compliance with Rule 24(c), which is denied,[58] Rule 24(a) and (c) cannot be complied with because the Investor Committee cannot identify a specific claim in identifiable property for which it seeks relief.

It appears that the Investor Committee really just wants to intervene in general on a wholesale basis in this case, not to be heard with regard to the Middleton Property, in which the Committee admits no member has an interest. However, any attempt at wholesale intervention should be nipped in the bud because the Committee has not and cannot inform the Court of the grounds upon which intervention is sought and the rights of its members are being adequately protected by the SEC and the Receiver in this action. Intervention should not be allowed to give the Investor Committee carte blanche access to come to Court and air generalized grievances about the Receiver's administration of the Receivership Estate.

Simply put, allowing the Committee to intervene in this case to second guess the Receiver's actions, when Committee members have no discrete interest in the subject of the action and its members' interests are being adequately represented by the SEC and the Receiver, undermines this Court's appointment of the Receiver and will needlessly complicate this case to the detriment of all parties.

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[57] *See Dillard v. City of Foley*, 166 F.R.D. 503, 506 (D.C. Ala. 1996).

[58] Rule 24(c) "is designed to ensure that parties have advance notice of the claims that an intervenor plans to make." *SEC v. Investors Sec. Leasing Corp.*, 610 F.2d 175, 178 (3d. Cir. 1979). The purpose of Rule 24(c) is "to inform the court of the grounds upon which intervention is sought, but also to inform parties against whom some right is asserted or relief sought, so they may be heard before the court passes upon the application." *Int'l Bhd. Of Teamsters, Local 523 v. Keystone Freight Lines, Inc.*, 123 F.2d 326, 328 (10th Cir. 1941). The Committee Objection does not provide advance notice of any claims the Investor Committee plans to make, nor does it inform the Court, the Receiver or other parties in interest of any other rights the Committee will seek to assert.

IV. Conflicts Of Interest Plague The Investor Committee And It Should Not Be Afforded Credibility Through Intervention.

The Investor Committee is comprised of members who hold inherent conflicting interests based on their holding, or not, of ABIs and perhaps for other reasons.[59] At this time, there is no way to understand how competing interests amongst Committee members are being addressed by the Committee and its counsel,[60] and, therefore, the Committee cannot be afforded credibility through intervention. Two examples illustrate this point.

First, as to the Middleton Property, the economic interest of the Committee members should dictate that they support the abandonment of the Property as proposed because it will reduce the costs of administering the Receivership Estate and markedly reduce claims that can be asserted against the Estate. Yet, the Receiver has been contacted by one member of the Committee urging that the Middleton Property not be abandoned so as to allow for a potential joint venture. This urging is contrary to the apparent economic interests of the other members of the Committee, yet for whatever reason, the Motion and the Committee Objection have been filed to advance this position.

Second, conflicts will occur as ABIs are contested by the Receiver. A good illustration of this point is the Receiver's pending sale of the "Cottonwood" parcel of property still held by the Receivership Estate, against which several Investor Committee members have filed ABIs. If the Receiver seeks to invalidate the ABIs of the 3 Investor Committee members holding ABIs filed against that property, the 51 remaining Investor Committee members without ABIs against that property would arguably welcome such relief because sale proceeds of the property would be ratably paid out by the Receiver to satisfy their claims. On the other hand, the 3 Committee

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[59] Receiver Declaration ¶¶ 10 and 13 *supra*.

[60] *See infra* Part V.

members holding ABIs filed against that property would expect counsel to vigorously defend their rights under the ABIs and would justifiably want to argue that their ABIs attach to the sale proceeds from the sale. The same conflicts also exist with other properties being sold by the Receiver as Committee members also hold ABIs in Expressway Business Park, Fairfield, and one of the Elkhorn lots.

V. The Committee Has Not Provided Any Information On Its Governance, Bylaws, Power Of Attorney, Or Counsel's Authority To Act On Behalf Of Its Members.

Representation of a collection of diverse individuals through the formation of a "committee" is largely a creature of bankruptcy court. To address a multitude of issues inherent in an *ad hoc* committee representing the common interests of numerous parties, Congress passed Federal Rule of Bankruptcy Procedure 2019.[61] In relevant part, Bankruptcy Rule 2019 governs the disclosure that is required by groups and committees in a bankruptcy case and states in relevant part:

> (b) Disclosure by groups, committees, and entities.
>
> (1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.
>
> (c) Information required. The verified statement shall include:
>
> (1) the pertinent facts and circumstances concerning:
>
> (A) with respect to a group or committee, . . . the formation of the group or committee, including the name of

[61] The Receiver recognizes that Bankruptcy Rule 2019 does not apply here. However, Bankruptcy Rule 2019 was designed to force *ad hoc* committee's to disclose information to inform the Court of what constituencies they represent and to mandate disclosure on how those committees function. Although *ad hoc* committees are rare in equity receiverships, to the extent the Investor Committee seeks recognition from this Court, it should be forced to comply with disclosure requirements similar to those imposed by bankruptcy courts so that when positions are taken on matters related to this case the Court and the parties to the action can understand the interests and motives being asserted.

> each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act; or
>
> . . . .
>
> (2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:
>
> (A) name and address;
>
> (B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and
>
> . . . .
>
> (4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.[62]

Thus, Bankruptcy Rule 2019 requires self-styled committees to disclose: (a) facts concerning the formation of the committee; (b) the nature and amount of each member's disclosable economic interest; and (c) copies of any instruments authorizing the committee to act on behalf of its members. This type of information is important to understand standing of committees on discrete issues within a case, as well the authority of professionals to represent the alleged collective group.

In this case, neither the Court nor the Parties, including the SEC and the Receiver, have any way to understand the Investor Committee's standing and interests, or whether counsel for the Investor Committee is authorized to speak on behalf of the purported members. Finally, despite the serious conflicts of interest discussed above, the Committee has not provided any bylaws or other documents, which govern its ability to resolve conflicts between its members, or which divulge when the Committee is authorized to act or the authority of its counsel to act. Absent full disclosure, akin to the disclosure required under Bankruptcy Rule 2019, the Court

[62] Bankruptcy Rule 2019 (b)-(c).

should deny the Motion for this additional reason. Furthermore, to prevent future abuses, absent this disclosure, the Investor Committee should not be allowed to appear in this case. The Receiver will continue to welcome their input directly to him, or if by counsel to the Investor Committee, to the Receiver's counsel.

The Motion does not raise permissive intervention pursuant to Fed. R. Civ. P. 24(b). Thus, the SEC and the Receiver have not addressed the requirements for permissive intervention, but they believe that permissive intervention is equally inappropriate and reserve the right to address these issues if they are ever raised.

CONCLUSION

For all of the reasons set forth above, the Motion filed by the self-proclaimed Investor Committee to intervene it this case in regard to the Middleton Motion or any other matter should be denied.

DATED this 19th day of July, 2013.

SECURITIES AND EXCHANGE COMMISSION

/s/ Thomas Melton (with permission)
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Daniel J. Wadley
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/s/ Peggy Hunt
Peggy Hunt
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Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **JOINT MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE** was filed with the Court on this 19th day of July, 2013, and served via ECF on all parties who have requested notice in this case, including the Movants.

/s/*Peggy Hunt*