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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: right;">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: right;">Defendants,</p> <p>and</p> <p>THE TRUE &amp; MARJORIE KIRK FAMILY TRUST,</p> <p style="text-align: right;">Intervenor.</p>	<p style="text-align: center;"><b>RECEIVER’S MOTION FOR SUMMARY JUDGMENT AGAINST THE KIRK TRUST ON THE RECEIVER’S FIRST, SECOND, THIRD AND FOURTH CAUSES OF ACTION AND SUPPORTING MEMORANDUM</b></p> <p style="text-align: center;">2:12-cv-00591 BSJ</p> <p style="text-align: center;">The Honorable Bruce S. Jenkins</p>
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Pursuant to Fed. R. Civ. P. 56, and DUCivR 56-1, R. Wayne Klein, the Court-Appointed Receiver (the “Receiver”) of the estate of National Note of Utah, LC (“NNU”), its subsidiaries and affiliates (the “Palmer Entities”), and the estate of Wayne LaMar Palmer (“Palmer”) (collectively, “National Note”), respectfully submits this Motion and supporting memorandum

seeking summary judgment on the Receiver's First, Second, Third and Fourth Causes of Action set forth in his Counterclaim against The True and Marjorie Kirk Family Trust (the "Kirk Trust").

This Motion is supported by the Deposition of William True Kirk ("Mr. Kirk") dated July 3, 2013 (the "T. Kirk Depo."), a true and correct transcript of which is submitted as Exhibit A; the Declaration of Scott R. Frost dated June 22, 2012 (the "Frost Dec."), a true and correct copy of which is submitted as Exhibit B; the sworn testimony of Wayne L. Palmer taken in *In the Matter of National Note of Utah, LC*, on May 30, 2012 (the "Palmer Testimony"), a true and correct transcript of which is attached as Exhibit A to the Frost Dec.; and the Declaration of Receiver R. Wayne Klein Regarding Findings of Insolvency of National Note Entities dated July 30, 2013, submitted as Exhibit C (the "Receiver Dec.").

## I. INTRODUCTION

National Note operated as a classic Ponzi scheme because it solicited funds from investors, promising that it would make guaranteed, above-market returns to investors when, in fact, investors were being paid from the commingled funds solicited from other investors. In many instances, NNU purported to "secure" investments with an interest in real property by issuing instruments denominated "Assignment of Beneficial Interest in Trust Deed" or "ABIs" through which NNU purported to assign its beneficial interests in trust deeds. Yet, as discussed below, these ABIs have no legal effect because it is undisputed that NNU never assigned to investors, who were ABI holders, NNU's interest in the underlying debt instrument. In fact, the trust deeds in which "interests" were assigned were illusory—purportedly existing by and between NNU and another affiliated Palmer Entity.

Intervenor Kirk Trust is an NNU investor. In approximately April 2009 and July 2011, the Kirk Trust obtained promissory notes from NNU memorializing loans in the principal sums of \$300,000 and \$100,000, respectively. In connection with the promissory notes, NNU executed ABIs purporting to assign NNU's beneficial interest in trust deeds encumbering real property in Arizona (defined below as the "Arizona ABI") and Spanish Fork, Utah (defined below as the "Spanish Fork ABI"). It is undisputed that NNU did not assign to the Kirk Trust the underlying debt supposedly existing and secured by the trust deeds in which NNU obtained a beneficial interest.

On August 10, 2011 – over a month after the Kirk Trust's July 2011 loan and over two years after the Kirk Trust's April 2009 loan – NNU executed an actual trust deed in favor of the Kirk Trust encumbering certain property in Brigham City, Utah (the "Twin Pines Trust Deed"). The stated purpose of the Twin Pines Trust Deed was to secure the Kirk Trust's two prior loans which had been cancelled and renewed with the issuance of the Twin Pines Trust Deed. Mr. Kirk, the co-trustee of the Kirk Trust, admits that the Kirk Trust demanded that NNU execute the Twin Pines Trust Deed to gain priority over other creditors. NNU received no contemporaneous transfer of funds in connection with NNU's execution of the Twin Pines Trust Deed.

The Kirk Trust now seeks in its Complaint in Intervention to enforce the Twin Pines Trust Deed. The Receiver denies that this Trust Deed is enforceable, and has asserted numerous Counterclaims against the Kirk Trust. This Motion seeks summary judgment on the Receiver's First, Second, Third and Fourth Causes of Action asserted as Counterclaims. Central to all Counterclaims is the underlying principle that the Kirk Trust, like all other investors who lost

their principal investment in NNU's scheme, should not be allowed to obtain more than a *pro rata* share of the liquidation proceeds of the Receivership Estate.<sup>1</sup>

Pursuant to his First Cause of Action, the Receiver seeks a declaration that the Arizona ABI and Spanish Fork ABI are invalid instruments as a matter of law. As a result, the Receiver may avoid the Twin Pines Trust Deed as a fraudulent transfer, and the Kirk Trust is not entitled to any payment priority over other similarly situated creditors for repayment of its \$300,000 and \$100,000 loans to NNU. Summary judgment on the First Cause of Action declaring the ABIs void is appropriate because the ABIs are not accompanied by any interest in the underlying trust deed notes or any other obligation secured by the Trust Deeds, and are thus void as a matter of law. Further, the Twin Pines Trust Deed was given by NNU for no new value at a time when NNU was insolvent, and is therefore avoidable as a matter of law.

The Receiver also seeks summary judgment on his Second, Third and Fourth Causes of Action to avoid the Twin Pines Trust Deed as a fraudulent transfer pursuant to Utah Code Ann. §§ 25-6-5(1) and 25-6-6(1). Summary judgment avoiding the Twin Pines Trust Deed is appropriate because it is undisputed that NNU was being operated as a Ponzi scheme and was hopelessly insolvent since at least 2009; NNU did not receive reasonably equivalent value for the Twin Pines Trust Deed, which was given for the sole purpose of enhancing one creditor's position vis-à-vis other similarly situated creditors; NNU intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as its debts became due because, as part of its scheme, NNU relied solely on funds from new investors to pay prior

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<sup>1</sup> If ABIs and Trust Deeds like those obtained by the Kirk Trust are allowed to stand, a relatively few investors will receive a return on their investments in this scheme to the detriment of all other investors.

investors. Accordingly, the Receiver is entitled to avoid the Twin Pines Trust Deed as a fraudulent transfer as a matter of law.

## II. PROCEDURAL HISTORY

1. On June 25, 2012, the Securities & Exchange Commission filed with the Court its Complaint against NNU (the “SEC Complaint”), alleging that Palmer operated NNU as a classic Ponzi scheme and asserting various causes of action for securities fraud.<sup>2</sup>

2. The SEC also filed an *Ex Parte* Motion for Temporary Restraining Order and an *Ex Parte* Motion to Appoint Receiver and to Stay Litigation, with a Memorandum in Support of *Ex Parte* Motion for Temporary Restraining Order and Other Relief (the “TRO Memo”)<sup>3</sup> seeking, *inter alia*, a TRO and the appointment of a Receiver.

3. Upon the filing of the SEC Complaint on June 25, 2012, the Court entered its Order Appointing Receiver and Staying Litigation (the “Receivership Order”),<sup>4</sup> appointing the Receiver and creating the Receivership Estate, which includes the estates of NNU and Palmer, including their respective interests in at least 41 entities affiliated with NNU, which are referred to in the Receivership Order as the “Palmer Entities.”<sup>5</sup>

4. On December 7, 2012, the Kirk Trust filed its *Motion to Intervene and Supporting Memorandum*,<sup>6</sup> seeking an order of the Court allowing it to intervene to protect its purported

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2 Docket No. 1.

3 Docket Nos. 2, 4, 5 & 6.

4 Docket No. 9.

5 Docket No. 9, pp. 1-3.

6 Docket No. 89.

interest in the Twin Pines Trust Deed and the underlying real property (the “Twin Pines Property”).

5. The Court entered its *Order Granting the True & Marjorie Kirk Family Trust’s Motion to Intervene* on January 24, 2013.<sup>7</sup>

6. The Kirk Trust filed its *Complaint in Intervention* (“the Kirk Trust Complaint”) on January 24, 2013,<sup>8</sup> asserting that by virtue of the Twin Pines Trust Deed, the Kirk Trust has a first priority security interest on the Twin Pines Property, securing debt which was past due and owing in the amount of \$454,200.00.<sup>9</sup>

7. The Kirk Trust Complaint seeks (a) a declaratory judgment finding the Twin Pines Trust Deed to be a valid first priority security interest and allowing the Kirk Trust to proceed with foreclosure of the Twin Pines Property, (b) enforcement of a proposed settlement that has not been approved by the Court, and (c) damages for alleged takings and unjust enrichment.<sup>10</sup>

8. The Receiver filed his *Answer to the True and Marjorie Kirk Family Trust’s Complaint in Intervention, Affirmative Defenses, and Counterclaims* on February 27, 2013, (a) denying that any debt allegedly owed to the Kirk Trust is secured by the Twin Pines Trust Deed, (b) denying the enforceability of the settlement agreement with the Kirk Trust that the Court did

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7 Docket No. 137.

8 Docket No. 138.

9 *Id.*, ¶ 27.

10 *Id.*, ¶¶ 29, 35, 41 & 47.

not approve, and (c) denying that the Kirk Trust is entitled to damages for takings or unjust enrichment.<sup>11</sup>

9. The Receiver further asserted counterclaims against the Kirk Trust for (a) a declaratory judgment that the Kirk Trust was not a holder of a secured claim, (b) judgment that NNU's execution and delivery of the Twin Pines Trust Deed is a fraudulent transfer, and (3) judgment that the Kirk Trust was unjustly enriched by NNU's issuance of the Twin Pines Trust Deed.<sup>12</sup>

10. The Kirk Trust filed an *Answer to Counterclaim*, denying the material allegations of the Receiver's Counterclaim and affirmatively alleging that NNUs obligations to the Kirk Trust are secured by an interest in real property, represented by its ABIs and the Twin Pines Trust Deed.<sup>13</sup>

11. The parties have had the opportunity to engage in both written and oral discovery, with the Receiver taking the deposition of Mr. Kirk, co-trustee of the Kirk Trust, on July 3, 2013. The material facts are undisputed and the legal issues are now ripe for adjudication by the Court.

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11 Docket No. 178, Answer ¶¶ 11, 26-30, 31-36, 37-41, 42, 45-47.

12 *Id.*, Counterclaim ¶¶ 44, 46-51, 52-58, 59-65, 66-72.

13 Docket No. 221, ¶¶ 5, 7, 8, 11, 12, 14, 16, 19, 21, 22, 24, 25

### **III. STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS**

#### ***THE ARIZONA ABI AND THE SPANISH FORK ABI ARE VOID<sup>14</sup>***

##### **A. Legal Elements and Authorities:**

An assignment of a deed of trust without assignment of the underlying debt instrument is void.<sup>15</sup>

##### **B. Material Facts Necessary to Meet the Elements:**

###### ***The Arizona ABI:***

1. In April of 2009, the Kirk Trust loaned \$300,000 to NNU (the “April 2009 Loan”) memorialized by a Promissory Note dated April 30, 2009 (the “First Arizona Note”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 1.<sup>16</sup>

2. The First Arizona Note bore interest at the rate of 18% per annum, with a late fee of 2% for each payment not paid within 15 days of the due date.<sup>17</sup>

3. On April 30, 2009, NNU executed an “Assignment of Beneficial Interest in Trust Deed” in favor of the Kirk Trust (the “Arizona ABI”), a true and correct copy of which is attached to the T. Kirk Depo as Exhibit 3,<sup>18</sup> stating that NNU assigned to the Kirk Trust \$300,000 of its beneficial interest in a Trust Deed issued to it by Palmer Entity Homeland

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<sup>14</sup> See *infra* Part IV.A (discussing this argument in further detail).

<sup>15</sup> See Utah Code Ann. § 70A-9a-109, Official Comment 7; *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009); *Wolfe v. Leisure Time Sports, Inc. (In re Leisure Time Sports, Inc.)*, 194 B.R. 859, 861 (9th Cir. BAP 1996); *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 970-71 (Bankr. N.D. Ill. 1991); *Pierce v. Tavormina (In re Hurricane Resort Co.)*, 30 B.R. 258, 260-61 (S.D. Fla. 1983).

<sup>16</sup> See Exhibit A (T. Kirk Depo.), p. 10, li. 13-17 & Exhibit 1 (First Arizona Note).

<sup>17</sup> See *id.*

<sup>18</sup> See Exhibit A (T. Kirk Depo.), p. 13 & Exhibit 3 (Arizona ABI).



Development II, LLC (“Homeland”)<sup>19</sup> to secure an alleged Promissory Note between Homeland and NNU (the “Homeland Note”) relating to certain real property located in Arizona (“Arizona Property”).<sup>20</sup>

4. Other than the interest, if any, afforded by the Arizona ABI, the Kirk Trust’s April 2009 First Arizona Note was unsecured.<sup>21</sup>

5. NNU did not execute a separate written assignment to the Kirk Trust of its interest in the Homeland Note.<sup>22</sup>

6. No employee or representative of NNU told the Kirk Trust that it was receiving an assignment of NNU’s interest in the Homeland Note.<sup>23</sup>

7. The Kirk Trust’s claims against NNU were not secured by a Trust Deed on the Arizona Property.<sup>24</sup>

***The Spanish Fork ABI***

8. In July 2011, the Kirk Trust loaned an additional \$100,000 to NNU which is memorialized by a Promissory Note dated July 8, 2011 (the “First Spanish Fork Note”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 8.<sup>25</sup>

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19 Homeland is a “Palmer Entity,” as defined in the Receivership Order, Docket No. 9, pp. 1-3. Homeland is not a party to the Arizona ABI. *See* Exhibit A (T. Kirk Depo.), Exhibit 3 (Arizona ABI).

20 *See* Exhibit A (T. Kirk Depo.), Exhibit 3 (Arizona ABI).

21 *See* Exhibit A (T. Kirk Depo.), p. 17, li. 9-18.

22 *Id.*

23 *Id.*, p. 37, li. 4-11.

24 *Id.*, p. 17, li. 9-18.

25 *Id.*, p. 27, li. 22 – p. 29, li. 5 & Exhibit 8 (First Spanish Fork Note).

9. The First Spanish Fork Note bore interest at the rate of 12% per annum, together with a late fee of 2% for each interest payment not paid within 15 day of its due date.<sup>26</sup>

10. On July 7, 2011, NNU executed an “Assignment of Beneficial Interest in Trust Deed” in favor of the Kirk Trust (the “Spanish Fork ABI”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 10,<sup>27</sup> stating that NNU assigned to the Kirk Trust an undivided \$100,000 of its beneficial interest in a Trust Deed issued to it by Palmer Entity Expressway Business Park, LLC (“Expressway”)<sup>28</sup> to secure an alleged Promissory Note between Expressway and NNU (the “Expressway Note”) relating to certain real property located in Spanish Fork, Utah (the “Spanish Fork Property”).<sup>29</sup>

11. Other than the interest, if any, afforded by the Spanish Fork ABI, the Kirk Trust’s July 2011 Spanish Fork Note was unsecured.<sup>30</sup>

12. NNU did not execute a separate written assignment to the Kirk Trust of its interest in the Expressway Note.<sup>31</sup>

13. No employee or representative of NNU told the Kirk Trust that the Kirk Trust was receiving an assignment of NNU’s interest in the Expressway Note.<sup>32</sup>

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<sup>26</sup> *See id.*

<sup>27</sup> *See* Exhibit A (T. Kirk Depo.), p. 31, li. 13-17 & Exhibit 10 (Spanish Fork ABI).

<sup>28</sup> Expressway is a “Palmer Entity” as defined by the Receivership Order, Docket No. 9, pp. 1-3. Expressway is not a party to the Spanish Fork ABI. *See* Exhibit A (T. Kirk Depo.), Exhibit 10 (Spanish Fork ABI).

<sup>29</sup> *See* Exhibit A (T. Kirk Depo.), Exhibit 10 (Spanish Fork ABI).

<sup>30</sup> *See* Exhibit A (T. Kirk Depo.), p. 31, li. 13 – p. 32, li. 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, p. 37, li. 6-11.

14. The Kirk Trust's claims against NNU were not secured by a Trust Deed on the Spanish Fork Property.<sup>33</sup>

***THE TWIN PINES TRUST DEED IS A FRAUDULENT TRANSFER***<sup>34</sup>

**A. Legal Elements and Authorities:**

Utah Code Ann. § 25-6-5. Fraudulent transfer – Claim arising before or after transfer

- (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
  - (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
  - (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:
    - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
    - (ii) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Utah Code Ann. §25-6-6. Fraudulent transfer – Claim arising before transfer

- (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
  - (a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
  - (b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

Utah Code Ann. § 25-6-3. Insolvency

- (1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.
- (2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

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<sup>33</sup> *Id.*, p. 31, li. 25 – p. 32, li. 2.

<sup>34</sup> *See infra* Part IV.B (discussing this argument in further detail).

**B. Facts Necessary to Meet the Elements:**

15. The Receiver incorporates Facts I.B.1–14 above.

***Payment in full of the Arizona Note***

16. On August 1, 2009, NNU executed a second Promissory Note pursuant to which it agreed to pay the Kirk Trust \$300,000 (the “Second Arizona Note”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 4.<sup>35</sup>

17. The Second Arizona Note bore interest at the rate of 18% per annum, with a late fee of 2% for each payment not paid within 15 days of the due date.<sup>36</sup>

18. The Kirk Trust did not lend an additional \$300,000 to NNU in August 2009 relating to the Second Arizona Note. Rather, the Second Arizona Note states that it “pays in full, by renewal” the First Arizona Note.<sup>37</sup>

19. NNU did not issue a security instrument of any kind to the Kirk Trust in August 2009 relating to the Second Arizona.<sup>38</sup>

20. On July 1, 2011, NNU executed a third promissory note pursuant to which it agreed to pay the Kirk Trust \$300,000 (the “Third Arizona Note”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 5.<sup>39</sup>

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35 See Exhibit A (T. Kirk Depo.), p. 19, li. 3-13 & Exhibit 4 (Second Arizona Note).

36 See Exhibit A (T. Kirk Depo.), Exhibit 4 (Second Arizona Note).

37 See *id.*

38 See Exhibit A (T. Kirk Depo.), p. 20, li. 18 – p. 21, li. 1.

39 See *id.*, p. 21, li.10-18 & Exhibit 5 (Third Arizona Note).

21. The Third Arizona Note bore interest at the rate of 18% per annum, with a late fee of 2% for each payment not paid within 15 days of the due date.<sup>40</sup>

22. The Kirk Trust did not lend an additional \$300,000 to NNU in July 2011 relating to the Third Arizona Note; rather the Third Arizona Note states that it “pays in full, by renewal,” the Second Arizona Note.<sup>41</sup>

23. NNU did not issue a security instrument to the Kirk Trust in July 2011 related to the Third Arizona Note.<sup>42</sup>

24. On August 10, 2011, NNU executed a fourth promissory note pursuant to which it agreed to pay the Kirk Trust \$300,000 (the “Fourth Arizona Note”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 6.<sup>43</sup>

25. The Fourth Arizona Note bore interest at the rate of 18% per annum, with a late fee of 2% for each payment not paid within 15 days of the due date.<sup>44</sup>

26. The Kirk Trust did not lend an additional \$300,000 to NNU in August 2011 relating to the Fourth Arizona Note. Rather, the Fourth Arizona Note states that it “pays in full, by renewal,” the Third Arizona Note.<sup>45</sup>

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40 See Exhibit A (T. Kirk Depo.), Exhibit 5 (Third Arizona Note).

41 See *id.*

42 See Exhibit A (T. Kirk Depo.), p. 22, li. 16-19.

43 See *id.*, p. 23, li. 19-24 & Exhibit 6 (Fourth Arizona Note).

44 See Exhibit A (T. Kirk Depo.), Exhibit 6 (Fourth Arizona Note).

45 See *id.*

***Payment in full of the Spanish Fork Note***

27. On August 10, 2011, NNU executed another promissory note, pursuant to which it agreed to pay the Kirk Trust \$100,000 (the “Second Spanish Fork Note”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 11.<sup>46</sup>

28. The Kirk Trust did not lend an additional \$100,000 to NNU in August 2011 relating to the Second Spanish Fork Note. Rather, the Second Spanish Fork Note states that it “pays in full, by renewal,” the First Spanish Fork Note.<sup>47</sup>

***The Twin Pines Trust Deed***

29. In connection with the execution of the Fourth Arizona Note and the Second Spanish Fork Note, on August 10, 2011, NNU, as Trustor, executed a Deed of Trust in favor of the Kirk Trust (the “Twin Pines Trust Deed”), a true and correct copy of which is attached to the T. Kirk Depo. as Exhibit 7, respecting certain real property located in Brigham City, Utah (the “Brigham City Property”).<sup>48</sup>

30. Mr. Kirk, the co-trustee of the Kirk Trust, required that NNU provide the Kirk Trust with the Twin Pines Trust Deed because he wanted “separate collateral without an ABI secured by note and deed of trust and a title policy that says it’s in first place.”<sup>49</sup>

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46 See Exhibit A (T. Kirk Depo.), p. 44, li. 1-5 & Exhibit 11 (Second Spanish Fork Note).

47 See Exhibit A (T. Kirk Depo.), Exhibit 11 (Second Spanish Fork Note).

48 See Exhibit A (T. Kirk Depo.), p. 27, li. 16-18 & Exhibit 7 (Twin Pines Trust Deed).

49 See Exhibit A (T. Kirk Depo.), p. 24, li. 13-17.

31. Mr. Kirk imposed that requirement “[b]ecause we had no control over how many or how much additional ABIs could be assigned against the Arizona note. So we wanted to be in first place with our own security.”<sup>50</sup>

32. Mr. Kirk considered the Twin Pines Trust Deed to be a more secure type of security instrument than the assignment of beneficial interest because it was “insured by title policy guaranteeing we’re in first place. It had no potential of other ABIs that could dilute the security interest.”<sup>51</sup>

33. NNU’s execution of the Twin Pines Trust Deed was not contemporaneous with the Kirk Trust’s payment of funds pursuant to the First Arizona Note in 2009.<sup>52</sup>

34. NNU’s execution of the Twin Pines Trust Deed was not contemporaneous with the Kirk Trust’s payment of funds pursuant to the First Spanish Fork Note in July of 2011.<sup>53</sup>

35. At the time it executed the Twin Pines Trust Deed in favor of the Kirk Trust in August 2011, NNU was insolvent.<sup>54</sup>

36. In July of 2012, Mr. Kirk obtained an appraisal of the Brigham City Property, indicating that its value is \$330,000.<sup>55</sup>

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<sup>50</sup> See *id.*, p. 24, li. 22-25.

<sup>51</sup> See *id.*, p. 26, li. 1-9.

<sup>52</sup> See Exhibit A (T. Kirk Depo.), Exhibit. 1 (First Arizona Note)

<sup>53</sup> See *id.*, Exhibit 8\_ (First Spanish Fork Note).

<sup>54</sup> Exhibit C (Receiver Declaration) ¶¶ 7, 8.

<sup>55</sup> See Exhibit A (T. Kirk Depo.), p. 28, li 12-19.

***Insolvency – The Ponzi Scheme***

37. From at least 1994 until the filing of the SEC Complaint, NNU raised capital by soliciting investors to purchase promissory notes, which typically promised to pay interest at above-market rates.<sup>56</sup>

38. Investors were told that their investments would be used to, among other things, buy and sell mortgage notes, underwrite and make loans, or buy and sell real estate assets through NNU, or one of the Palmer Entities.<sup>57</sup>

39. Typically, investors deposited their funds into a NNU account at JP Morgan Chase Bank titled “Investor Trust Account.” NNU then immediately wired nearly all of the investor funds to an account at Wells Fargo titled “Investor Interest Account.”<sup>58</sup>

40. Monies on deposit in the Investor Interest Account were then used to make interest payments to other investors.<sup>59</sup>

41. Beginning in 1998, NNU’s internal financial records show that NNU’s total liabilities exceeded its total claimed assets.<sup>60</sup>

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56 Exhibit B (Frost Dec.) at ¶ 13.

57 *Id.*, ¶¶ 8, 10 & Exhibit A (Palmer Testimony), p. 93, li. 7-12.

58 *See* Exhibit B (Frost Dec.), ¶¶ 17-22, 28, 31-33, Exhibit A to Frost Dec. (Palmer Testimony), p. 164, li. 22 – p. 165 li. 22; p. 166, li. 9 – p. 167, li. 232, Exhibit F to Frost Dec. (Spreadsheets of Money Movement, 2009-2012).

59 *See* Exhibit B (Frost Dec.), ¶¶ 15-23, 25, 33-35, 38 and Exhibit F. to Frost Dec. (Spreadsheets of Money Movement, 2009-2012).

60 *See* Exhibit C (Receiver Dec.), at ¶¶ 8-11.



42. NNU's bank records demonstrate that, from at least 2009, NNU was dependent on new investor funds to remain operational, that NNU was insolvent, and that each subsequent investment increased NNU's insolvency.<sup>61</sup>

43. As of August 10, 2011, NNU's assets were not sufficient to meet its liabilities as they became due.<sup>62</sup>

44. As of August 10, 2011, NNU was generating insufficient funds from its investments to make interest payments to its creditors/investors and would not have been able to survive without an influx of new investor funds.<sup>63</sup>

45. Beginning in at least September of 2011 and continuing thereafter, NNU was unable to make timely interest payments to its investors.<sup>64</sup>

46. NNU continued to solicit new investors even after it stopped making timely payments of interest to its existing investors.<sup>65</sup>

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<sup>61</sup> See Exhibit B (Frost Dec.), ¶¶ 17-23 and Exhibit F to Frost Dec. (Spreadsheets of Money Movement, 2009-2012); see generally Exhibit C (Receiver Dec.).

<sup>62</sup> Exhibit C (Receiver Dec.), ¶¶ 16-20.

<sup>63</sup> See Exhibit B (Frost Dec.), ¶¶ 18-25; 27-36.

<sup>64</sup> See Exhibit B (Frost Dec.), Exhibit A (Palmer Testimony), p. 113, li. 3-16

<sup>65</sup> See Exhibit B (Frost Dec.), ¶¶ 45-53, and Exhibit A (Palmer Testimony), p. 231, li. 14 – p. 232, li. 24; p. 234, li. 18 – P. 235, li. 25.

#### IV. ARGUMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court “shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

In this matter, the material facts are undisputed, presenting pure issues of law for determination by the Court. For the reasons discussed below, the Court should grant summary judgment on the First, Second, Third and Fourth Causes of Action set forth in the Receiver’s Counterclaim in that the purported ABIs are void as a matter of law and the Twin Pines Trust Deed is avoidable as a fraudulent transfer pursuant to the Utah Fraudulent Transfer Act (the “UFTA”), Utah Code Ann. §§ 25-6-5(1) and 25-6-6(1).

**A. THE ARIZONA AND SPANISH FORK ABIs ARE VOID BECAUSE NNU DID NOT ASSIGN THE ARIZONA AND SPANISH FORK NOTES TO THE KIRK TRUST.**

The Arizona and Spanish Fork ABI state that they assign to the Kirk Trust NNU’s supposed beneficial interest in the Homeland and Expressway Trust Deeds. However, it is undisputed that NNU never assigned to the Kirk Trust any interest that it held based on the underlying Homeland Note or Expressway Note. Courts uniformly hold that such an attempt to transfer an interest based on a security interest without transfer of the underlying debt is void.

“It is hornbook law that a mortgage follows the debt it secures. An assignment of a mortgage without a transfer of the underlying debt is a nullity.”<sup>66</sup> “It is axiomatic that any attempt to assign the mortgage without transfer of the debt will not pass the mortgagee’s interest

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<sup>66</sup> *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 970 (Bankr. N.D. Ill 1991).

to the assignee.”<sup>67</sup> “A security interest cannot exist, much less be transferred, independent from the obligations which it secures. If the debt is not transferred, neither is the security interest.”<sup>68</sup> “An assignment of a deed of trust separate from the note has no ‘force’” – if the note is not also assigned, the assignment of the deed of trust is, for all practical purposes, ineffectual because the note and deed of trust have become split.<sup>69</sup>

Utah law is consistent with the cases cited above. Utah Code Ann. § 70A-9a-109 discusses the scope of Utah’s Uniform Commercial Code, particularly as it relates to the assignment of a mortgage or other security interest in real and personal property. Official Comment 7 to that section states: “An attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real property mortgage, would be ineffective.” Official Comment 7 further states: “Finally . . . one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation.”

In this case, it is undisputed that when NNU executed the Arizona and Spanish Fork ABIs, stating that it was assigning its beneficial interests in the Homeland and Expressway Trust Deeds to the Kirk Trust, NNU did not assign the supposed secured obligations created under the Homeland and Expressway Notes. Accordingly, under Utah law, the Arizona and Spanish Fork ABIs are void and, as a result, the Kirk Trust’s claims against NNU were wholly unsecured.

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<sup>67</sup> *Id.*

<sup>68</sup> *Wolfe v. Leisure Time Sports, Inc. (In re Leisure Time Sports, Inc.)*, 194 B.R. 859, 861 (9th Cir. BAP 1996).

<sup>69</sup> *See Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009).

**B. THE TWIN PINES TRUST DEED IS A VOIDABLE FRAUDULENT TRANSFER.**

In his Second, Third and Fourth Causes of Action, the Receiver seeks to avoid the Twin Pines Trust Deed pursuant to Utah Code Ann. §§ 25-6-5(1) and 25-6-6(1). As set forth below, the undisputed facts demonstrate that the Twin Pines Trust Deed is avoidable as a fraudulent transfer for a variety of reasons.

**1. The Twin Pines Trust Deed is an Avoidable Fraudulent Transfer Under UFTA § 25-6-5(1)(a) Because It Was Given With Actual Intent To Hinder, Delay Or Defraud Creditors of NNU.**

A transfer is fraudulent as to creditors if the debtor made the transfer with “actual intent to hinder, delay, or defraud” its creditors.<sup>70</sup> “Under the UFTA, a debtor’s actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme.”<sup>71</sup> “A Ponzi scheme is a ‘fraudulent enterprise in which funds from more recent investors provide the only source to pay interest to prior investors or to provide the return of principal promised to prior investors.’”<sup>72</sup>

In this case, it is undisputed that National Note operated as a Ponzi scheme. NNU relied on an influx of money from new investors to pay promised interest and principal payments to prior investors. NNU executed and delivered the Twin Pines Trust Deed for the sole purpose of advancing the Kirk Trust interests ahead of its other creditors, thus intentionally hindering and delaying – and even defrauding – not only later investors, but prior investors. Accordingly, the Pines Trust Deed is avoidable by the Receiver as a fraudulent transfer.

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<sup>70</sup> Utah Code Ann. § 25-6-5(1)(a).

<sup>71</sup> *SEC v. Madison Real Estate Group, LLC*, 647 F.Supp.2d 1271, 1279 (D Utah 2009).

<sup>72</sup> *In re M&L Bus. Mach. Co., Inc.*, 59 F.3d 1078, 1080 (10<sup>th</sup> Cir. 1995).

**2. The Twin Pines Trust Deed is Constructively Fraudulent Pursuant to UFTA § 25-6-5(1)(b).**

A transfer is fraudulent as to creditors if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value while the debtor was engaged in a business for which its remaining assets are unreasonably small or the debtor intended, believed, or should have believed he would incur, debts beyond his ability to pay as they became due.<sup>73</sup>

Where the execution of the Twin Pines Trust Deed was made pursuant to a Ponzi scheme, it may be presumed that NNU's remaining assets were unreasonably small or that NNU intended to incur or should have believed it would incur debts beyond its ability to pay.<sup>74</sup> The only legal issue is whether the transfer was made for "reasonably equivalent value." For the reasons set forth below, National Note did not receive reasonably equivalent value for its execution of the Twin Pines Trust Deed.

**a. NNU Received No Benefit From Execution of the Twin Pines Trust Deed.**

Reasonably equivalent value under the UFTA has been described as "a price [that] a capable and diligent businessman could presently obtain for the property after conferring with those accustomed to buy such property."<sup>75</sup> In this case, NNU conveyed a valuable and realizable interest in the Brigham City Property to the Kirk Trust to secure the Fourth Arizona Note and the Second Spanish Fork Note - notes that NNU knew were valueless because NNU had no ability to

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<sup>73</sup> See Utah Code Ann. § 25-6-5(1)(b).

<sup>74</sup> See *Donell v. Kowell*, 533 F.3d 762, 770-71 (9<sup>th</sup> Cir. 2008).

<sup>75</sup> See *Official Comm. Of Unsecured Creditors v. Western United Life Assurance Co. (In re Tri-Valley Distrib., Inc.)*, 452 B.R. 837 (Bankr. D. Utah 2011) (citing *Meyer v. Gen. Am. Corp.*, 569 P.2d 1094, 1097 (Utah 1977)).

pay the amounts owed thereunder.<sup>76</sup> By executing the Twin Pines Deed, NNU depleted the value of its estate without receiving any concomitant benefit. No “capable and diligent businessman” would make that deal.

**b. The Kirk Trust’s Purported Release of the Arizona and Spanish Fork ABIs Does Not Constitute Reasonably Equivalent Value.**

The Kirk Trust contends that it provided reasonably equivalent value for the Twin Pines Trust Deed by assigning its purported beneficial interest in the Homeland and Expressway Trust Deeds, represented by the Arizona and Spanish Fork ABIs, back to NNU.<sup>77</sup> In other words, it claims that the value it afforded was its release of a prior interest in property.

However, as set forth in Part IV above, the Arizona and Spanish Fork ABIs were legal nullities and never conferred upon the Kirk Trust any valid interest in property. Moreover, it cannot be disputed that the Kirk Trust had already released the First Arizona and First Spanish Fork Notes when the subsequent Notes were obtained from NNU, thereby releasing the ABIs supposedly tied to those first Notes. Accordingly, Kirk Trust’s purported release of its interest in the ABIs and underlying properties conferred no benefit upon NNU because the Kirk Trust had no interest as a matter of law. Thus, the assignments provided no value, let alone reasonably equivalent value.

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<sup>76</sup> While a transfer made to secure an antecedent debt constitutes “value,” it does not necessarily constitute reasonably equivalent value. *See* Utah Code Ann. § 25-4(1).

<sup>77</sup> The Kirk Trust executed an “Assignment of Beneficial Interest in Trust Deed for Security” respecting the Homeland Trust Deed and another respecting the Expressway Trust Deed on September 19, 2011 – more than a month after execution of the Twin Pines Trust Deed. The assignment respecting the Expressway Trust Deed was recorded on September 21, 2011. The Receiver has not received a copy of a recorded assignment respecting the Homeland Trust Deed.

**c. The Renewal of the Arizona Notes Did Not Provide Reasonably Equivalent Value to NNU.**

NNU's repayment obligation to the Kirk Trust was documented by the First Arizona Note issued on April 30, 2009, which Note was subsequently renewed by the Second Arizona Note, the Third Arizona Note and finally the Fourth Arizona Note on August 10, 2011 – the date the Twin Pines Trust Deed was executed in favor of the Kirk Trust. Importantly, however, no funds were ever transferred to NNU in conjunction with each Note renewal.

In fact, the only time funds were advanced to NNU in relation to the Arizona Notes, and therefore the only time NNU received a benefit from the Kirk Trust relating to that investment, was in April of 2009. Because the only benefit NNU received relating to the April 2009 Loan occurred more than two years prior to the execution of the Twin Pines Trust Deed, the subsequent renewals of the Arizona Notes do not constitute reasonably equivalent value in exchange for the Twin Pines Trust Deed.

**d. The Twin Pines Trust Deed Did Not Provide Present Value to NNU.**

“A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.”<sup>78</sup> In this case, it is undisputed that NNU's execution of the Twin Pines Trust Deed for the benefit of the Kirk Trust was not “substantially contemporaneous” with the Kirk Trust's transfer of funds to NNU in April 2009. Based on the transactions, it cannot be disputed that the parties did not intend for the April 2009 Loan to be secured by any trust deed, let alone the 2011 Twin Pines Trust Deed. Rather, the original advance of funds pursuant to the First Arizona Note in April of 2009 was “secured” by the legally invalid Arizona ABI.

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<sup>78</sup> Utah Code Ann. § 25-6-4(3).

It further cannot be disputed that based on the transactions that the parties did not intend for the execution of the Twin Pines Trust Deed to be contemporaneous with the transfer of funds pursuant to the First Spanish Fork Note in July of 2011. Indeed, the First Spanish Fork Note was purportedly secured by the Spanish Fork ABI, not a trust deed. It was not until the Second Spanish Fork Note was executed, with no contemporaneous transfer of funds from the Kirk Trust to NNU, that the Twin Pines Trust Deed was executed.

NNU did not receive present value contemporaneously with the execution of the Twin Pines Trust Deed. The sole purpose of the transaction was, as Mr. Kirk admits, to provide the Kirk Trust with “separate collateral without an ABI secured by note and deed of trust and a title policy that says it’s in first place.”<sup>79</sup> Indeed, Mr. Kirk considered the Twin Pines Trust Deed to be a more secure type of security instrument than the assignment of beneficial interest because it was “insured by title policy guaranteeing we’re in first place. It had no potential of other ABIs that could dilute the security interest.”<sup>80</sup>

The UFTA is designed, in part, to prevent one creditor from obtaining preferential treatment over other creditors. The *post hoc* transfer of the Twin Pines Trust Deed with no contemporaneous transfer of value from the Kirk Trust thwarts that fundamental policy. If the transfer is upheld, the Kirk Trust will receive preferential treatment over other defrauded NNU investors.

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79 See *supra* ¶ II.B.32 (quoting Exhibit A (T. Kirk Depo.), p. 24, li. 13-17).

80 See *supra* ¶ II.B.20 (quoting Exhibit A (T. Kirk Depo.), p. 26, li. 1-9).



**3. The Twin Pines Trust Deed is Constructively Fraudulent Pursuant to Utah Code Ann. § 25-6-6(1).**

A transfer is fraudulent under Utah Code Ann. § 25-6-6(1) if the debtor made the transfer without receiving a reasonably equivalent value and was insolvent or became insolvent as a result of the transfer. Where the sum of NNU's debts was greater than the value of its assets, NNU was insolvent pursuant to Utah Code Ann. § 25-6-3(1). Further, for the reasons set forth above, NNU did not receive reasonably equivalent value in exchange for the Twin Pines Trust Deed.

**V. CONCLUSION**

The Arizona and Spanish Fork ABIs are void as a matter of law and conveyed no secured interest in any property to the Kirk Trust. Further, the execution of the Twin Pines Deed of Trust was both actually and constructively fraudulent as to NNU. Accordingly, it is respectfully submitted that this Court should grant the Receiver's Motion, enter summary judgment on the Receiver's First, Second, Third and Fourth Causes of Action, and permit the Receiver to avoid the transfer of the Twin Pines Trust Deed so that he can liquidate the Brigham City Property and distribute the proceeds of that Property pro rata to the many investors who lost money investing in this fraudulent enterprise.

DATED this 5<sup>th</sup> day of August, 2013.

**DORSEY & WHITNEY LLP**

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**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that the foregoing document was filed with the Court on this 5<sup>th</sup> day of August, 2013, was served via ECF on all parties who have requested notice in this case, and was served via email on this 5<sup>th</sup> day of August, 2013 on the following:

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