

Blake D. Miller (#4090)
Barry C. Toone (#13443)
MILLER GUYMON, P.C.
165 South Regent Street
Salt Lake City, UT 84111
Telephone: (801) 363-5600
Facsimile: (801) 363-5601
miller@millerguymon.com
toone@millerguymon.com

Attorneys for Proposed Intervenors

IN THE 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.

**MOTION TO INTERVENE AND
SUPPORTING MEMORANDUM**

Case No. 2:12-cv-00591-BSJ

Honorable Bruce S. Jenkins

(Hearing Requested)

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Christopher Affleck, Make a Paddle Properties, Inc., Eric Bawden, Ronald Crossman, Takeo Iwamoto, Takeo Iwamoto Limited Partnership, The Takeo Iwamoto Family Trust, Lila Frandsen, Dennis and Jane Heaton, Dale Himmer, Jim Keller, Joe Mackey, Mark and Susan Mathison, JPS/MKS Partners, Ltd., Robert K. Mitchell, Cory and Brilee Palmer, Dan and Debra Palmer, Mont and Shauna Palmer, Van and Sharon Palmer, Yardmasters Yearound Maintenance, Inc., Brian A. Spires, Michael and Laurie Vertner, Russ Wirtala, and Karen Thomas (Witkamp) (collectively, the “Investors”)

hereby respectfully move that the Court enter an order allowing them to intervene in this action. A proposed Answer in Intervention is attached as Exhibit "A." The Investors respectfully request that the Court set this Motion for a hearing.

RELIEF SOUGHT AND GROUNDS FOR MOTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the Investors seek an order allowing them to intervene in this action as a matter of right. The Investors have been named as defendants in ancillary proceedings to this action filed by R. Wayne Klein, the Receiver of National Note of Utah, LC ("NNU") (collectively, the "Ancillary Proceedings"). In the Ancillary Proceedings, the Receiver alleges that NNU operated as a Ponzi scheme and seeks, among other relief, an order requiring the Investors to disgorge payments they received from NNU or, at the very least, any interest received on their investments. Further, in some cases, the Receiver seeks an order voiding assignments of beneficial interests in certain trust deeds.

The fundamental question in both this action and in the Ancillary Proceedings is whether NNU operated as a Ponzi scheme. The Investors should be allowed to intervene in this action to present evidence that NNU did not, in fact, operate as a Ponzi scheme. Because the Ancillary Proceedings are closely related to this action, an adjudication of the "Ponzi scheme" question in this case may, as a practical matter, impair or impede the Investors' ability to protect their interests in the Ancillary Proceedings. Also, NNU and Wayne Palmer, the defendants in this action, do not adequately represent the interests of the Investors. Finally, at the very least, the Court should grant this motion on the basis of permissive intervention, since there is a common

question of fact pertaining to the existence of a Ponzi scheme in both this action and in the Ancillary Proceedings.

MEMORANDUM IN SUPPORT OF MOTION

Statement of Facts

1. The SEC filed its Complaint in this action on June 25, 2012.
2. The Receiver filed most of the Ancillary Proceedings in or about June 2013.
3. The following paragraphs identify the respective Ancillary Proceedings and briefly describe the procedural status of each action:
 - a. Christopher Affleck and Make a Paddle Properties, Inc., Case No. 2:13-cv-00577. Affleck and Make a Paddle Properties, Inc.'s answer is due by October 23, 2013.
 - b. Eric Bawden, Case No. 2:13-cv-00478. Bawden filed his Answer to the Receiver's Complaint on October 4, 2013.
 - c. Ronald Crossman, Case No. 2:13-cv-00845. Crossman waived formal service of the Complaint on October 1, 2013, and his answer is due November 29, 2013.
 - d. Takeo Iwamoto, Takeo Iwamoto Limited Partnership, and The Takeo Iwamoto Family Trust, Case No. 2:13-cv-00542. These defendants waived formal service of the Complaint in early August 2013, and their answer will be due shortly.
 - e. Lila Frandsen, Case No. 2:13-cv-00845. Frandsen's answer is not yet due.

- f. Dennis and Jane Heaton, Case No. 2:13-cv-00448. The Heatons waived formal service of the Complaint on September 24, 2013.
- g. Dale Himmer, Case No. 2:13-cv-00525. Himmer's answer is not yet due.
- h. Jim Keller, Case No. 2:13-cv-00418. Keller's answer is currently due by October 31, 2013.
- i. Joe Mackey, Case No. 2:13-cv-00500. Mackey's answer is currently due by October 18, 2013.
- j. Mark and Susan Mathison, Case No. 2:13-cv-00845. The Mathisons waived formal service of the Complaint on October 1, 2013, and the answer is due by November 29, 2013.
- k. JPS/MKS Partners Ltd., Case No. 2:13-cv-00523. JPS/MKS Partners filed its Answer on September 16, 2013.
- l. Robert K. Mitchell, Case No. 2:13-cv-00570. The case docket reflects that Mitchell was served on October 3, 2013, and that his answer will be due by November 4, 2013.
- m. Cory and Brilee Palmer, Case No. 2:13-cv-00573. The Palmers' answer is currently due by October 15, 2013.
- n. Dan Palmer, Case No. 2:13-cv-00583. Dan Palmer formally waived service of the Complaint on September 16, 2013. His answer is currently due by October 15, 2013.

- o. Debra Palmer, Case No. 2:13-cv-00574. Debra Palmer's answer is currently due by October 15, 2013.
- p. Mont and Shauna Palmer, Case No. 2:13-cv-00548. The Palmers' answer is currently due by October 15, 2013.
- q. Van and Sharon Palmer, Case No. 2:13-cv-00512. The Palmers' answer is currently due by October 15, 2013.
- r. Yardmasters Yearound Maintenance, Inc., Case Nos. 2:13-cv-00583 and 2:13-cv-00548. Yardmasters' answer is not yet due.
- s. Brian A. Spires, Case No. 2:13-cv-00522. Spires's answer is not yet due.
- t. Michael and Laurie Vertner, Case No. 2:13-cv-00810. This action was filed on September 3, 2013. The docket reflects that no summons has yet been issued.
- u. Russ Wirtala, Case No. 2:13-cv-00489. Wirtala filed his Answer on September 20, 2013.
- v. Karen Thomas (Witkamp), Case No. 2:13-cv-00579. Thomas's answer is currently due by November 15, 2013.

4. In the Ancillary Proceedings, the Receiver alleges that "NNU was operated as an enterprise with all the characteristics of a Ponzi scheme through which money was solicited from Investors." (Complaint at ¶ 1; a copy of the Complaint filed against Eric Bawden is attached as Exhibit "B.")

5. In the First Claim for Relief, seeking avoidance of alleged fraudulent transfers, the Receiver alleges that “NNU was engaged in an enterprise with all the characteristics of a Ponzi scheme” and that NNU made certain transfers to the Investors “in furtherance of the Ponzi scheme.” (*Id.* at ¶¶ 21-22.)

6. The Receiver makes similar claims in the Second and Third Claims for Relief for avoidance of alleged fraudulent transfers. (*Id.* at ¶¶ 28-29, 36-37.)

7. The Fourth Claim for Relief seeks a constructive trust based on alleged transfers made “in furtherance of the Ponzi scheme.” (*Id.* at ¶ 44.)

8. The Fifth Claim for Relief for unjust enrichment similarly relies on the alleged existence of a Ponzi scheme. (*Id.* at ¶ 50.)

9. Finally, the Sixth Claim for Relief seeks disgorgement of alleged transfers that “were made as part of and in furtherance of a Ponzi scheme.” (*Id.* at ¶ 57.)

10. In the actions seeking an order voiding assignments of beneficial interests in certain trust deeds, the Receiver similarly relies on the alleged existence of a Ponzi scheme. (*See, e.g.*, Complaint in Case No. 2:13-cv-00845, at ¶ 20.)

11. In this action, on July 19, 2013, the SEC filed its Motion for Summary Judgment and Supporting Memorandum against Defendant Wayne LaMar Palmer.

12. Pursuant to the Court’s Order entered on September 12, 2013 (Doc. No. 440), Palmer must file his response to the Motion for Summary Judgment on or before October 14, 2013. Also, the hearing on the Motion for Summary Judgment has been scheduled for November 1, 2013, at 1:30 p.m.

ARGUMENT

I. THE INVESTORS ARE ENTITLED TO INTERVENE IN THIS ACTION AS A MATTER OF RIGHT.

The Court should enter an order allowing the Investors to intervene in this action as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure. Pursuant to Rule 24(a)(2), intervention must be granted to anyone who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” An applicant may intervene as a matter of right if “(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 as a practical matter be impair[ed] or impede[d]’; and (4) ‘the applicant’s interest is not adequately represented by existing parties.’” *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) (citation omitted). As set forth below, the Investors have met each of these elements.

A. The Motion to Intervene Has Been Timely Filed.

The Investors’ motion to intervene is timely. “The timeliness of a motion to intervene is assessed ‘in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.’” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (citation omitted). Further, the timeliness requirement “‘is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the

original parties by the failure to apply sooner.” *Id.* (citation omitted). As set forth in the Receiver’s Fourth Status Report, dated August 13, 2013, in “June 2013, the Receiver filed 111 lawsuits against overpaid investors, which suits made demand for overpaid funds,” among other requested relief. (Doc. No. 408-1 at 32.) Thus, the Ancillary Proceedings were not filed until over a year after the filing of this action. Many Investors were not served until late June or in July or August 2013. In many cases, the Investors only recently waived formal service of the respective complaints, thus granting them additional time to file an answer.

In addition, most of the Investors retained the undersigned counsel only within the last two months, and several within the past few days or weeks. In most cases, the answer is not yet due to be filed. Thus, although this action has been pending for over a year, the Investors have been brought into this matter only within the last two to three months. Indeed, the SEC and the Receiver should have reasonably expected that defendants named in ancillary proceedings would seek to intervene in this action to protect their interests. This is particularly true because the Receiver asserts, in essence, a “strict liability” theory against the Investors, seeking recovery of the interest paid to Investors on their investments regardless of whether the Investors acted in good faith. Under these circumstances, neither the SEC nor the Receiver can claim that they will be prejudiced by the proposed intervention. Because the Investors have timely moved for intervention, the Court should grant this motion.

B. The Investors Claim an Interest in the Subject Matter of this Action.

Because the Investors claim an interest in the subject matter of this action, the Court should grant this motion. In the 10th Circuit, the “interest” under Rule 24 “must be ‘direct,

substantial, and legally protectable.” *Utah Ass’n of Counties*, 255 F.3d at 1251 (citation omitted). The Investors’ interests meet this standard.

The Ancillary Proceedings are closely related to this action. In his pleadings in the Ancillary Proceedings, the Receiver repeatedly refers to the SEC’s claims in this action and the allegations that NNU operated as a Ponzi scheme. It is clear that, in the Ancillary Proceedings, the Receiver intends to rely on this Court’s determination of whether NNU operated as a Ponzi scheme. Thus, the Investors have a strong interest in intervening in this action to assert their defenses against the SEC’s (and, by extension, the Receiver’s) claims. *See Securities and Exchange Comm’n v. Management Solutions, Inc.*, No. 2:11-cv-1165-BSJ, 2013 WL 4501088, *21 (D. Utah August 22, 2013) (unpublished) (denying receiver’s motion to identify enterprise as a Ponzi scheme and stating that, as to intervenors and other parties “subject to clawback,” the issue “depends on time, context, the nature of the specific transactions, and the knowledge of the parties”). For these reasons, it is critical that the Investors be permitted to intervene and present their evidence and arguments in opposition to the SEC’s claims.

C. This Action May Impair the Investors’ Interests.

This Court’s disposition of the “Ponzi scheme” issue “may as a practical matter impair or impede” the Investors’ ability to protect their interests. “To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.” *Utah Ass’n of Counties*, 255 F.3d at 1253. Again, it is clear that the Receiver intends to rely on the outcome of this action in the Ancillary Proceedings. Although the Investors dispute that the Court’s

determination in this action would have res judicata or collateral estoppel effect in the Ancillary Proceedings, “the *stare decisis* effect of the district court’s judgment is sufficient impairment for intervention under Rule 24(a)(2).” *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, 100 F.3d at 844. The Receiver undoubtedly intends to rely on this Court’s determinations in seeking to prove his claims in the Ancillary Proceedings. Thus, the Investors have met their “minimal” burden to show that their interests may be impaired in the absence of the right to intervene in this action. *Utah Ass’n of Counties*, 255 F.3d at 1253.

D. The Investors’ Interests Are Not Adequately Represented.

Finally, the Investors’ interests in this action are not adequately represented by existing parties. The burden in meeting this element is likewise “minimal.” *Coalition of Arizona/New Mexico Counties for Stable Economic Growth*, 100 F.3d at 844 (citation omitted). In addition, the “possibility that the interests of the applicant and the parties may diverge ‘need not be great’ in order to satisfy this minimal burden.” *Utah Ass’n of Counties*, 255 F.3d at 1254 (citation omitted). Here, the objectives of the Investors, on the one hand, and NNU and Palmer, on the other hand, are not fully aligned. Although Palmer has an interest in defending against the SEC’s claims, he is also trying to avoid substantial civil and, presumably, possible future criminal penalties. Rather than defending on the merits, Palmer ultimately may wish to pursue a settlement with the SEC.

In addition, the Receiver has purportedly stepped into the shoes of NNU, the other defendant in this action. The Receiver is a directly adverse party to the Investors in the Ancillary Proceedings and has no interest in protecting the Investors’ rights. Thus, the Investors have met

their minimal burden to show that their interests are not adequately protected by the existing parties in this action. For the reasons set forth above, the Court should enter an order allowing the Investors to intervene in this action as a matter of right for the purpose of defending against the SEC's allegations that NNU operated as a Ponzi scheme.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION TO THE INVESTORS.

The Investors have met their burden to prove that they are entitled to intervene in this action as a matter of right under Rule 24(a). Alternatively, however, the Investors should be granted the right to intervene on the grounds of permissive intervention under Rule 24(b)(1)(B), which provides that the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." As set forth above, in his pleadings in the Ancillary Proceedings, the Receiver repeatedly refers to the SEC's claims in this action concerning an alleged Ponzi scheme. The question whether NNU operated as a Ponzi scheme lies at the heart of each of the Receiver's claims for relief against the Investors in the Ancillary Proceedings. Thus, both this action and the Ancillary Proceedings share legal and factual issues that must be determined in adjudicating the SEC's and the Receiver's claims. Accordingly, at the very least, the Investors should be granted leave to intervene on the basis of permissive intervention.

CONCLUSION

For the reasons set forth above, the Investors respectfully request that the Court enter an order granting this motion and allowing them to intervene in this action for the purpose of defending against the SEC's allegations that NNU operated as a Ponzi scheme.

DATED this 9th day of October 2013.

MILLER GUYMON, P.C.

/s/ Barry C. Toone

Barry C. Toone

Attorney for Proposed Intervenors