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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: center;">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: center;">Defendants.</p>	<p>MEMORANDUM IN SUPPORT OF RECEIVER'S MOTION FOR AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS</p> <p>2:12-cv-00591 BSJ</p> <p>The Honorable Bruce S. Jenkins</p>
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R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") in this matter, by and through his counsel of record, submits his Memorandum in Support of *Receiver's Motion for Authorization to Sell Elkhorn Ridge Cabin Lot Free and Clear of Purported Interests* (the "Motion"). The Motion and the statements herein are supported by the *Declaration of Receiver R. Wayne Klein* filed concurrently herewith the ("Receiver Declaration").

I.

BACKGROUND

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

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

- “[D]etermine the nature, location and value of all property interests of the Receivership Defendants and the Palmer Entities . . . [.]”³
- “To take custody, control and possession of all Receivership Property and records . . . [.]”⁴
- “To use Receivership Property for the benefit of the Receivership Estates and hold in his possession, custody and control all Receivership Property, pending further Order of this Court[.]”⁵
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities”⁶
- “[T]ransfer, compromise, or otherwise dispose of any Receivership Property, other than real estate, in the ordinary course of business, on the terms and in the manner the

¹ Docket No. 9 (Receivership Order), *as amended*, Docket No. 50.

² *See generally, id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

⁵ *Id.* at ¶ 7(D).

⁶ *Id.* at ¶ 19.

Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such Receivership Property.”⁷

- “[L]ocate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property.”⁸
- “[S]ell, and transfer clear title to, all real property in the Receivership Estates” upon order of the Court “pursuant to procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004.”⁹

II.

REAL PROPERTY TO BE SOLD

The Elkhorn Ridge Subdivision

3. Since his appointment, the Receiver has identified numerous real properties as being part of the Receivership Estate, and where appropriate has listed such property for sale.¹⁰

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

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 38.

⁹ *Id.* at ¶ 39.

¹⁰ Receiver Declaration ¶ 4.

that purchasers of the lots will need to install wells and septic tanks.¹¹

5. As part of his investigation of this subdivision, the Receiver discovered that a pre-condition to the sale of the Elkhorn Ridge lots required the resolution of certain zoning issues with the Oneida County Planning and Zoning Commission (the “Zoning Commission”), including NNU’s construction of a fence around the entire subdivision. Until those issues were resolved, no lots could be sold.¹²

6. Accordingly, the Receiver met with the Zoning Commission and requested a variance to allow the sale of one of the lots so as to allow the Receivership Estate to obtain funds sufficient to comply with the zoning issues.¹³

7. The Zoning Commission has conditionally granted the variance, allowing one lot to be sold, but prohibiting the sale of any other lots until the perimeter fence is constructed and past due property taxes for the subdivision are paid.¹⁴

Marketing of the Property

8. On or about October 11, 2012, after obtaining the variance from the Zoning Commission, the Receiver caused certain lots in the Elkhorn Ridge subdivision to be listed for sale, including the property at issue herein as described below, through Idaho Real Estate Group.¹⁵

9. To determine an offering price for the properties in question and comply with his duties, the Receiver obtained appraisals for the three Cabin Lots and one of the empty lots, and

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

¹³ Receiver Declaration ¶ 7.

¹⁴ Receiver Declaration ¶ 8.

¹⁵ Receiver Declaration ¶ 9.

the advice of his independent real estate professional.¹⁶

10. The properties were listed for sale on the multiple listing service, and were actively marketed by the realtor.¹⁷

The Property to Be Sold, the Purchase Agreement and the Alternative Back Up Offer

11. The property at issue in the present Motion is one of the three Cabin Lots,¹⁸ the legal description being as follows:

- Lot 1, Elkhorn Ridge Estates, according to the official plat thereof as recorded September 17, 2007 in Oneida County, Idaho, Recorder's Office, as instrument number 141595.

(“Elkhorn Ridge Lot #1”). This Elkhorn Ridge Lot #1 has a partially-built cabin and an outbuilding that was designed as a garage, but which had been used by NNU as a sales office for the subdivision.¹⁹

12. On or about October 16, 2012, the Receiver received an offer to purchase Elkhorn Ridge Lot #1, and after consulting with his realtor, the Receiver made a counteroffer and ultimately reached agreement related to this offer (the “Purchase Agreement”).²⁰

13. On or about October 26, 2012, the Receiver received a second offer to purchase Elkhorn Ridge Lot #1, which offer is being held as a back up offer (the “Back Up Offer”).²¹

14. Although the Receiver has no reason to believe that the sale contemplated by the Purchase Agreement will not be consummated, in the event that it is not, the Receiver is alternatively seeking approval of the Back Up Offer.²²

¹⁶ Receiver Declaration ¶ 10 & Exh. 2 (Appraisal).

¹⁷ Receiver Declaration ¶ 11.

¹⁸ Receiver Declaration ¶ 12.

¹⁹ Receiver Declaration ¶ 12.

²⁰ Receiver Declaration ¶ 13.

²¹ Receiver Declaration ¶ 14.

²² Receiver Declaration ¶ 15.

15. Both the Purchase Agreement and the Back Up Offer have been negotiated by the Receiver with the respective prospective purchasers in good faith and at arms' length.²³

Material Terms of Sale

16. As proposed in the Purchase Agreement, the Receiver will sell Elkhorn Ridge Lot #1 to the purchaser, subject to Court approval, for a purchase price of \$130,000.00.²⁴

17. An earnest money deposit in the amount of \$500.00 has been made by the potential purchaser, and the sale is where is, as is, with no representations or warranties.²⁵

18. The terms of the Back Up Offer are materially similar to the Purchase Agreement described above, except the purchase price is in the amount of \$135,00.00.²⁶

Sale Costs and Net Sale Proceeds

19. The Receiver anticipates paying ordinary costs of sale, including market-rate closing costs and a standard 6.9 % realtor commission at the time of closing of the sale.²⁷

20. Furthermore, as discussed above, the Receiver's ability to sell Elkhorn Ridge Lot #1 is conditioned, in part, on his compliance with the Zoning Commission's variance. Under that variance, the Receiver is required to use proceeds of the sale to pay for the installation of the perimeter fence and back taxes for the subdivision. At this time, the Receiver estimates, based on third party bids obtained, that the fence will cost no more than \$15,000.00 to build, and that property taxes for the subdivision will be no more than \$3,000.00 (collectively, the "Variance Costs").²⁸

²³ Receiver Declaration ¶ 16.

²⁴ Receiver Declaration, Exh. 3 (Purchase Agreement).

²⁵ Receiver Declaration Exh. 3 (Purchase Agreement).

²⁶ Receiver Declaration, Exh. 4 (Back Up Offer).

²⁷ Receiver Declaration ¶ 20.

²⁸ Receiver Declaration ¶ 21.

21. Any interests against Elkhorn Ridge Lot #1, other than the closing costs and Variance Costs described above, will not be paid at the time of closing of the sale. Rather, as proposed, any such interests (to the extent that they exist and without any waiver of the Receiver's rights and defenses related thereto) will survive the sale and will attach to the net sale proceeds, these being the sale proceeds, less the ordinary costs of sale and the Variance Costs (the "Net Sale Proceeds").²⁹

22. The Receiver will separately account for the Net Sale Proceeds pending resolution of any disputes related to interests that may exist against Elkhorn Ridge Lot #1.

Free and Clear Sale

23. The Receiver proposes to sell Elkhorn Ridge Lot #1 free and clear of all interests therein, with any interests that may exist attaching to the Net Sale Proceeds. In so doing, the Receiver is in no way waiving any rights, claims, interests or defenses to any claims or interests made against Elkhorn Ridge Lot #1 or to the Net Sale Proceeds.³⁰

24. To determine interests, if any against Elkhorn Ridge Lot #1, the Receiver obtained a preliminary title report with respect to this property (the "Title Report").

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

²⁹ Receiver Declaration ¶ 22.

³⁰ Receiver Declaration ¶ 24.

beneficial interest in the Insider Deed of Trust to secure their investment with NNU; and (d) an ABI issued to investor Peter Moritz (“Moritz”), purporting to provide Moritz a beneficial interest in the Insider Deed of Trust to secure his investment with NNU.³¹

26. For the reasons discussed below, the Receiver does not believe that the ABI interests are valid, but to the extent that they continue to be asserted, the Receiver proposes that the sale be allowed with any interest that may exist pursuant to such ABIs, attaching to the Net Sale Proceeds thereof.

27. Moritz’s promissory note has been paid in full, and Moritz has informed the Receiver that he will execute a release of his ABI and not claim an interest in Elkhorn Ridge Lot #1 or the Net Sale Proceeds thereof.³²

28. Mehlhoff’s ABI was issued in conjunction with a December 2005 NNU promissory note. Like the Moritz ABI, according to records in the Receiver’s control, there is no basis for Mehlhoff’s ABI because his promissory note paid in full in July 2007. The Receiver has requested that Mehlhoff agree to release his ABI, but as of this time, Mehlhoff has not done so. But, based on these facts, as well as issues related to the legal validity of any ABI, the Receiver does not believe that Mehlhoff has any interest in the Elkhorn Ridge Lot #1 or to the Net Sale Proceeds thereof. Nonetheless, to facilitate the proposed sale, he is agreeing to allow Mehlhoff’s alleged interest to attach to the Net Sale Proceeds until such time as any disputes between Mehlhoff and the Receiver can be resolved.³³

29. A copy of the Motion, this Memorandum, and the Declaration are being served on the relevant taxing authorities, Moritz and Mehlhoff.

³¹ Receiver Declaration ¶ 26 & Exhs. 7 and 8.

³² Receiver Declaration ¶ 28 & Exh. 9.

³³ Receiver Declaration ¶ 29 & Exh. 10.

Best Interests

30. The Receiver believes that the sale of Elkhorn Ridge Lot # 1 as proposed, or alternatively, pursuant to the Back Up Offer, is beneficial for and in the best interests of the Receivership Estate.³⁴

31. The appraised value of the Elkhorn Ridge Lot #1 is \$135,000.00. The proposed purchaser initially offered to purchase Elkhorn Ridge Lot #1 for \$120,000.00, and after good faith and arm's length negotiations and the Receiver's counteroffer, the Purchase Agreement was entered into, proposing a purchase price of \$130,000.00. Thus, the purchase price is 96.2% of the appraised value of Elkhorn Ridge Lot #1.³⁵

32. Sale of Elkhorn Ridge Lot #1 as proposed will result in getting one cabin completed and establishing residency in the subdivision, which it is hoped in turn will facilitate the sale of the other forty-six lots.³⁶

33. The proposed sale will provide sufficient proceeds to satisfy conditions set by the Zoning Commission for final approval of the subdivision, thus allowing the Receiver to proceed with marketing and selling the forty-six additional lots in the subdivision for the benefit of the Receivership Estate.³⁷

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

35. The SEC has been informed of the material terms of the sale, and has no objection

³⁴ Receiver Declaration ¶ 30.

³⁵ Receiver Declaration ¶ 31.

³⁶ Receiver Declaration ¶ 32.

³⁷ Receiver Declaration ¶ 33.

³⁸ Receiver Declaration ¶ 34.

thereto.³⁹

III.

ARGUMENT

Based on the facts above, the Receiver respectfully requests authorization to sell Elkhorn Ridge Lot #1 pursuant to the Purchase Agreement free and clear of liens and interests, with any such interests, to the extent that they exist, attaching to the Net Sale Proceeds and held by the Receiver pending resolution of any disputes related thereto. Sale of Elkhorn Ridge Lot #1 as proposed is within the scope of the Receiver's authority under the Receivership Order as quoted above and 28 U.S.C. § 2001(b), it is in the best interests of the Receivership Estate, and the sale serves the purposes of the receivership by providing a "realization of the true and proper value" of Elkhorn Ridge Lot #1.⁴⁰

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

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

First, the sale will result in cash for the Receivership Estate based on a fair market value for of Elkhorn Ridge Lot #1. Specifically, Elkhorn Ridge Lot #1 has been marketed at an

³⁹ Receiver Declaration ¶ 36.

⁴⁰ Receivership Order ¶ 38.

offering price that is based on (a) the opinion of an experienced, third party realtor, and (b) an independent appraised value of the property. The appraisal has taken into consideration current market conditions, sales of comparable properties, and the particular nature of the properties. The Purchase Agreement proposes a purchase price that is very close to the appraised value, and based on input of the realtor, not a discounted or liquidation value of the property. As a result of marketing of the property at an offering price based on the appraised value, the Receiver has obtained two bids for the property, resulting in the Purchase Agreement and the Back Up Offer.⁴¹

Second, the proposed sale will result in the completion of one cabin and establish residency in the subdivision, which it is hoped in turn will facilitate the sale of the other forty-seven lots. It is anticipated that there will be a boost in sales of the other lots in the subdivision and reduce the chance of vandalism on the remaining property that is being marketed by the Receivership Estate.⁴²

Third, the proposed sale will provide sufficient proceeds to satisfy conditions set by the Zoning Commission for final approval of the subdivision, thus allowing the Receiver to proceed with marketing and selling the forty-seven additional lots in the subdivision.⁴³

Finally, the sale of Elkhorn Ridge Lot #1 as proposed will reduce, albeit slightly, the burden on the Receivership Estate. The Receiver will no longer have to spend time managing the property, and the Receivership Estate will no longer have obligations related to paying taxes on and other maintenance and upkeep expenses related to the property.⁴⁴

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

⁴¹ See Receiver Declaration Exhs. 3 & 4.

⁴² Receiver Declaration ¶ 32.

⁴³ Receiver Declaration ¶ 33.

⁴⁴ Receiver Declaration ¶ 34.

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

At this time, there do not appear to be any valid interests against the property, but those who potentially could be deemed to have an interest, specifically Moritz and Mehlhoff, will be served with the Motion to be given notice of the relief sought therein. Failure to object to these terms, will mean that the purported holders of interests consent to the relief sought herein, and that they may only look to the Net Sale Proceeds for any claim that they may eventually be held to have. This procedure will allow for the proposed sale to close, and preserve the status quo as to any disputes as to the validity of any ABI or other interest in Elkhorn Ridge Lot #1.

Request for Waiver of Conditions in 28 U.S.C § 2001

The Receivership Order provides that the Court may require that the proposed sale of real property satisfy 28 U.S.C. § 2001.⁴⁵ Subsection (b) of § 2001 permits, with Court approval, a private sale of receivership property as proposed herein, but it conditions such sale on (1) obtaining a purchase price that is no less than two-thirds of the appraised value of the property; (2) appointing “three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities[;]” (3) publication notice of the sale “at least ten days before confirmation[;]” and (4) cancellation of the sale “if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.”⁴⁶ Here, each of these

⁴⁵ Receivership Order ¶ 39.

⁴⁶ 28 U.S.C. § 2001(b).

factors has been complied with, or the Receiver requests that the Court approve the sale and waive the conditions imposed by § 2001(b).

Specifically, factor (1) is met in this case inasmuch as the purchase price for Elkhorn Lot #1 is 96.2% of the appraised value, and therefore far exceeds the 2/3 requirement. Factor (4) also has been met, inasmuch as the Receiver understands that the sale will not be approved if he receives a higher and better offer that is in compliance with § 2001(b) as quoted above and the sale is conditioned on this factor.

The Receiver requests that the Court waive factors (3) and (4) for this private sale inasmuch as they are unduly burdensome to the Receivership Estate and may jeopardize the proposed sale.⁴⁷ As discussed above, Elkhorn Ridge Lot #1 has been offered for sale based on the appraised value and the advise of a independent and experienced real estate professional. The appraisal was conducted by disinterested person, and takes into account comparable sales in the region and the condition of the property. Based on the appraised value, Elkhorn Ridge Lot #1 has been marketed on a multiple listing service by the real estate agent has resulted in two purchase offers, and has yielded a fair market value for the property that is nearly 93% of the appraised value. Given these facts, the requirement of additional appraisals and publication notice of sale, which would result in delay and a cost of not less than \$1,500.00 to the Receivership Estate, is unwarranted.⁴⁸ The process described above, in addition to the fact that the Purchase Agreement is subject to higher and better offers within scope of § 2001(b), means that Elkhorn Ridge Lot #1 will be sold for its maximum value, and subjecting the sale to additional appraisals and notice would not enhance, and may jeopardize, the proposed sale.

⁴⁷ Receiver Declaration ¶ 35.

⁴⁸ Receiver Declaration ¶ 35.

CONCLUSION

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

DATED this 14th day of November, 2012.

DORSEY & WHITNEY LLP

/s/Peggy Hunt

Peggy Hunt

Jeffrey M. Armington

Attorneys for Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **MEMORANDUM IN SUPPORT OF RECEIVER'S MOTION FOR AUTHORIZATION TO SELL ELKHORN RIDGE CABIN LOT FREE AND CLEAR OF PURPORTED INTERESTS** was filed with the Court on this 14th day of November, 2012, and served via ECF on all parties who have requested notice in this case including:

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Daniel J. Wadley
Paul N. Feindt
Alison J. Okinaka
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Furthermore, I certify that on the 14th day of November, 2012, the **MEMORANDUM** was served on the following parties by e-mail:

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Furthermore, I certify that on the 14th day of November, 2012, the **MEMORANDUM** was served on the following parties by U.S. Mail postage prepaid:

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/s/ Peggy Hunt