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IN THE UNITED STATES DISTRICT COURT

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, an individual, Defendants.	**COMBINED MOTION TO INTEREVENE AND SUPPORTING MEMORANDUM BY AMERICAN PENSION SERVICES, INC.** Civil No. 2:12-CV-591 BSJ Judge Bruce S. Jenkins

American Pension Services, Inc. ("APS"), through its counsel of record and pursuant to D.U.Civ.R. 7-1, hereby submits this Combined Motion to Intervene and Supporting Memorandum.

MOTION

APS hereby moves the Court for an order allowing APS to intervene in this matter. The grounds for this motion are that Wayne Klein, as the receiver appointed by the Court, has posted incomplete and erroneous legal advice to investors on his official website that investors should close their self-directed IRAs and that closing the accounts would not have negative tax consequences. Some investors may incur significant tax consequences if they follow Klein's advice and close their accounts and take a taxable distribution of their assets. Additionally, Klein has repeatedly posted statements on his website attacking the business reputation of the administrators of the investors' self-directed IRAs, such as APS, and has implied that the administrators are somehow responsible for the investors' Ponzi scheme losses. Accordingly, Klein needs additional oversight over his website and APS should be allowed to intervene to seek relief from this Court to rectify and fix the problems Klein has caused by providing incomplete and erroneous legal advice to investors.

MEMORANDUM

INTRODUCTION

This Court appointed Wayne Klein ("Klein") as the receiver in this action to reduce damages incurred by investors in Defendants' Ponzi scheme. Regretfully, Klein posted legal advice on his official website that investors should close their self-directed IRAs and that closing the accounts would not have negative tax consequences. Klein's posted legal advice was based on the hearsay testimony of an unidentified IRS agent. Investors had access to Klein's advice for almost five (5) months. Regretfully, some investors may incur significant tax consequences if they follow Klein's advice and close their accounts and take a taxable distribution of their assets.

Despite repeated requests, Klein has refused to clearly inform investors that following his advice may result in severe negative tax consequences or that they should not rely on his advice. Klein has repeatedly posted statements on his website attacking the business reputation of the administrators of the investors' self-directed IRAs and has implied that the administrators are somehow responsible for the investors' Ponzi scheme losses. Simply put, Klein needs additional oversight over his website and APS should be allowed to intervene to seek relief from this Court to rectify and fix the problems Klein has caused by providing incomplete and erroneous legal advice to investors.

STATEMENT OF FACTS

1. Plaintiff Securities and Exchange Commission (the "SEC") initiated this action by filing its Complaint on June 25, 2012.[1] (Doc. 1).

2. On June 25, 2012, this Court entered its Order Appointing Receiver and Staying Litigation ("Order Appointing Receiver"). The Court's Order Appointing Receiver appointed "Wayne Klein . . . as receiver (the "Receiver") for the estates of the Receivership Defendants. . . ."[2]

3. Paragraph 53 of the Order Appointing Receiver requires Mr. Klein to file a liquidation plan within ninety (90) days of the entry of the date of the Order Appointing Receiver.[3]

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[1] Docket No. 1.

[2] Docket No. 9 at 3.

[3] *Id.* at 19.

4. The Order Appointing the Receiver also requires Mr. Klein to file Quarterly Status Reports valuing the assets of the Receivership Property and anticipated distributions to claimants.[4]

5. The Receivership Defendants funded their Ponzi scheme by obtaining funds from investors who received promissory notes from the Receivership Defendants.[5] (Doc. 1).

6. A significant number of the investors invested monies with the Receivership Defendants which monies came from their IRA accounts or Roth IRA accounts.

7. APS is the administrator of self-directed individual retirement accounts (the "Administered IRAs").

8. APS in its capacity as the third party plan administrator does not recommend, endorse, or sell investments.

9. A significant number of the Administrated IRAs provided invested funds with the Receivership Defendants. APS is the administrator of the Administered IRAs.

10. Mr. Klein established a website to communicate information to the investors, including the investors who invested monies from the Administered IRAs.[6]

11. Mr. Klein describes the website as providing the following information: "(1) general information about receiverships, (2) answers to 'Frequently Asked Questions,' (3) copies of papers filed with the Court, and (4) periodic updates describing developments

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[4] *Id.* at 19.

[5] Docket No. 1 at 4-10.

[6] Docket No. 73 at 13.

related to the receivership estate and the SEC's case." (Doc. 73, p. 16). The website is located at http://www.kleinutah.com/index.php/receiverships/national-note-of-utah-lc.[7]

12. On August 8, 2012, Klein posted on his official website a document entitled "Paying Custodial Fees for Retirement Accounts," which the investors could access at http://www.kleinutah.com/wp-content/uploads/2012/06/08.04.2012-IRA-Custodian-Alternatives-r.pdf (the "IRA Advice Posting").[8]

13. The IRA Advice Posting contained legal advice from Klein to investors based on information an alleged and unidentified "IRS agent told an investor." Klein erroneously advised investors they could close their self-directed IRA accounts and that closing the accounts would not result in a taxable event requiring the administrator to issue a Form 1099R.[9]

14. Klein also advised the investors to provide a copy of the Order Appointing Receiver to the custodian of their self-directed IRAs "along with a signed and dated letter directing the custodian to close the retirement account." Klein's legal advice encouraged the investors to close their accounts based on his assurances in his official capacity as the Receiver that it would not result in negative tax consequences to the investor and they could avoid paying custodial fees on their accounts based on the value of the IRAs investments.[10]

15. On August 30, 2012, counsel for APS sent Klein's counsel a letter informing the Receiver that the legal advice contained in the IRA Advice Posting misstates the applicable law

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[7] *Id.*

[8] A copy of the IRA Advice Posting is attached hereto as Exhibit A.

[9] Exhibit A at 1.

[10] Exhibit A at 1.

in several important aspects and is extremely misleading. Moreover, APS explained in detail that if certain investors follow Mr. Klein's advice they may incur significant adverse tax consequences.[11]

16. APS informed Mr. Klein that his IRA Advice Posting provided erroneous legal advice in the following areas: (a) he incorrectly advised investors that the closure of a retirement account does not require a custodian to issue an Form 1099-R; (b) he incorrectly advised investors they could rollover distributed assets after more than 60 days; and (c) he incorrectly advised investors that closing their accounts may help them avoid "high" custodial fees.[12]

17. APS explained to Mr. Klein that his advice to investors to close their IRA accounts could result in negative tax consequences as follows:

> Assume, for example, that an investor who has not yet reached age 59½ has an account which contains a National Note investment with a face value of $50,000 and other assets with an aggregate value of $450,000. If that investor follows the Receiver's advice and directs his custodian to close his account and distribute all of the account's assets to the investor, not only will he have taxable income in an amount equal to the fair market value of all the distributed assets, but he will also owe a 10% early withdrawal penalty on such amount. Even if one assumes that the National Note investment has lost 95% of its value and therefore is only worth $2,500, the fair market value of the distribution would be $452,500. Assuming a 40% combined federal and state income tax rate, and including the 10% early withdrawal penalty, the investor would trigger $226,250 of taxes and penalties by closing his account.[13]

18. APS requested Mr. Klein to do the following: (a) retract and remove from the Receiver's website the IRA Advice Posting; (b) post a notice to investors that the IRA Advice

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[11] A copy of the August 30, 2012 letter is attached hereto as Exhibit B.

[12] Exhibit B at 5-7

[13] Exhibit B at 5.

Posting was not correct and they should seek independent advice; and (c) make a corrective statement curing his defamatory statements concerning custodian's alleged "abusive practices" and implications custodians are acting improperly by charging administrative fees, issuing Form 1099-Rs, etc.[14]

19. On September 5, 2012, Klein agreed to remove the IRA Advice Posting from his website and replaced the posting informing investors that it "may be advisable to seek independent guidance" from their tax advisor on issues related to closing their accounts and the payment of custodial fees.[15]

20. On September 6, 2012, APS requested Klein to more specifically warn investors who had already reviewed the IRA Advice Posting to seek independent advice and retract the negative statements he made about administrators of self-directed IRAs.[16]

21. Klein refused to include on his website any warning or direction to investors to not follow the advice in his IRA Advice Posting regarding the potential negative tax consequences investors may incur if they follow Klein's advice and close their account.

22. On October 12, 2012, APS discovered Klein was advising investors that the administrators of their IRAs "might share some responsibility for their losses." Klein also stated that "the Receiver does not expect to be pursuing claims such as this, where the claims would

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[14] Exhibit B at 7.

[15] Exhibit C.

[16] Exhibit D.

belong to individual investors." APS requested Klein to remove the postings attacking the business reputation of administrators over IRAs.[17]

23. On October 17, 2012, Klein agreed to remove the postings attacking the business reputation of administrators, provided that Klein "receive confirmation that this is the last request of this kind that he receives" from APS.[18] Given the Receiver's prior actions and postings, APS was unwilling to agree to not request any additional changes to the Receiver's website or object to future erroneous and incomplete legal advice posted on the Receiver's website.

24. APS subsequently discovered Klein's IRA Advice Posting still remained searchable on the world wide web meaning the document remained published somewhere on Klein's site/server and accessible to investors. APS also received letters from investors who were following Klein's advice in his IRA Advice Posting. These letters quoted portions of Klein's advice in the IRA Advice Posting.[19]

25. On December 24, 2012, after requests from APS, Klein ultimately informed APS that he finally removed his IRA Advice Posting from his website.[20] Klein, however, has refused to include a posting on his website informing investors that his IRA Advice Posting, accessible to investors for nearly 5 months, contains possible erroneous and incomplete advice suggesting they may close their IRA accounts without any consequences whatsoever. His advice is a direct contradiction of retirement plan rules and regulations as set forth by the IRS and ERISA law.

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[17] Exhibit E.

[18] Exhibit F.

[19] Exhibit G.

[20] Exhibit H.

26. Klein recognizes that as the Receiver he is charged with the obligation to limit the damage investors have already experienced from the Ponzi scheme of the Receivership Defendants.[21] Despite recognizing this duty, Klein has provided legal advice to investors that my result in severe negative tax consequences to some investors and additional resultant damage to the Investors.

[21] Docket No. 30 at 7 (the Receiver "seeks to maximize the value of the receivership on behalf of the investors").

ARGUMENT

APS should be allowed to intervene in this Action to seek relief from this Court requiring the Receiver to cease providing erroneous and incomplete legal advice to investors. APS is allowed to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure because it "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."[1] Rule 24 provides an applicant must be allowed to intervene if: (1) the application is timely; (2) the applicant has an interest in the subject matter of the dispute; (3) that interest is or may be impaired or impeded; and (4) the applicant's interest is not represented adequately by the existing parties.[2] Generally, the Tenth Circuit follows a liberal view in allowing intervention under Rule 24(a).[3]

APS has timely moved to intervene. The timeliness of a motion to intervene is viewed in light of 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."[4] APS' application is timely since it has timely moved to intervene after the Receiver took five months to remove his erroneous IRA Advice Posting and refused to inform investors who have access to his advice about possible negative tax consequences and damages

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[1] Fed.R.Civ.P. 24(a)(2).

[2] *Coalition of Arizona/New Mexico Counties for Stable Economic Growth,* 100 F.3d 837, 840 (10th Cir. 1996).

[3] *Elliot Industries Limited Partnership v. BP America Production Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

[4] *Id.*

investors might incur on top of the damage that has already been inflicted on them from Receivership Defendants' Ponzi scheme. No party will be prejudiced from APS's intervention. To the contrary, investors will benefit from receiving clarification that following the Receiver's advice in IRA Advice Posting may inflict additional harm to the investors.

Second, APS has demonstrated an interest which may be impaired or impeded. The threat of economic harm to an applicant's economic interest is sufficient to support the required interest.[1] Investors may suffer actual economic harm from following the Receiver's erroneous legal advice to close their accounts assuring them that such action will not trigger a taxable event, and stop paying administrative fees despite the contract between the investor and the IRA administrator. The Receiver's continued attack on administrators of IRAs claiming they may be "responsible" for investor losses from the Receivership Defendants' Ponzi scheme is not only a threat but actual economic harm to the business reputation of APS. APS has an economic interest to administer the investors' self-directed IRAs as required by the IRS, DOL, and ERISA law and pursuant to the terms of their contracts with the Investors.

APS satisfies the third element for intervention because its rights and the interests of the investors will be impaired unless it is allowed to intervene. APS need only show "that impairment of its substantial legal interest is possible if intervention is denied. The burden is minimal."[2] The investors have a substantial legal interest in maximizing their recovery on their investment to avoid additional damage. APS similarly has a substantial legal interest in administering the investors' self-directed IRAs as required by the IRS without interference from the

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[1] *Utahns for Better Transportation v. United States Dept. of Transportation,* 295 F.3d 1111, 1115 (10th Cir. 2002).

[2] *Utah Association of Counties, et al. v. Clinton, et al.,* 255 F.3d 1246, 1253 (10th Cir. 2001).

Receiver's erroneous advice and claims that APS may be responsible for the investors' Ponzi scheme losses when the IRA administrators did not recommend, endorse or sell the investment.

Finally, APS has established that its rights and the rights of the investors are not being adequately represented by the Receiver. The Receiver continues to provide erroneous legal advice to investors concerning the business of APS, possible claims or complaints against APS, and attack the business reputation of APS. The Receiver has also refused to fully and clearly inform investors that following his advice in the IRA Advice Posting may cause some investors additional damage. APS has met the minimal burden of showing that its interests and the investors' interests are not adequately represented by the current parties and it should be allowed to intervene. Accordingly, APS is entitled to intervene as a right.

CONCLUSION

Based on the foregoing, APS should be allowed to intervene in this Action to seek relief from this Court concerning the advice the Receiver continues to post on his website that may cause additional damage to investors and damages the business reputation of APS.

DATED this 28th day of December, 2012.

KIRTON McCONKIE

/s/ Cameron M. Hancock

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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Attorneys for Defendant Wayne Palmer

/s/ Cameron M. Hancock

EXHIBIT A

PAYING CUSTODIAL FEES FOR RETIREMENT ACCOUNTS

NATIONAL NOTE OF UTAH

Dear Investors:

We are aware that many investors invested monies from their IRA accounts or Roth IRA accounts. IRS rules require that these investments be maintained by an independent custodian. However, the investments were actually dependent on National Note, not the IRA custodian. As a result, some IRA administrators or custodians have been telling investors that they are required to continue paying the extremely high fees or the account will be closed. In some cases, the custodians have threatened that if investors close the accounts, the custodian will send tax notices that treat it as a distribution of the full amount – causing significant tax consequences.

One of the investors forwarded to us information he received from the IRS about alternatives.

The IRS agent told this investor that, of course, this situation is not unique. There have been many Ponzi schemes collapse where retirement funds were lost or frozen. The IRS agent explained that the investor can close the self-directed IRA accounts. At a later date, if funds are recovered, investors can make sure that distribution checks are made out in the name of the IRA or Roth IRA account. The investor can then deposit these payments into an existing or new IRA or Roth IRA account and the funds will retain their tax-advantaged status. The checks can be sent to the investor (made out to the IRA account) or sent by the Receiver directly to a previously-established IRA account.

The IRS agent suggested that investors have their accountants or tax preparers review IRS Publication 550, dealing with insolvency, bankruptcy, extensions of roll-over time limits, and recovery of prior IRA assets. The agent said that the custodians should not be reporting this as a taxable event using a Form 1099R.

In light of this guidance, investors should object to any threats that custodians will issue Form 1099s. If the custodians do issue Form 1099s, under these circumstances, we suggest two courses of action: first, contact the IRS to file a complaint about abusive practices by the custodian, and second, have your tax preparer send a letter along with your 2012 tax forms explaining why the Form 1099 issued by the custodian was not a distribution and should be ignored.

In sum, it appears that there are alternatives to continue paying the high maintenance fees on IRA and Roth IRA retirement accounts. It is fundamentally unfair for a custodian to continue charging fees that are based on a fictitious value of the asset. It is also unfair for the custodian to continue collecting fees for an asset of severely-diminished value.

Other alternatives might be transferring your IRA or Roth IRA to another financial institution or becoming your own custodian of your IRA account.

Wayne Klein, Receiver: August 4, 2012 wonder what the fee would be for that

EXHIBIT B

KIRTON | McCONKIE

Cameron M. Hancock
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August 30, 2012

VIA EMAIL & U.S. MAIL

Peggy Hunt
Dorsey & Whitney
136 S. Main Street, Suite 1000
Salt Lake City, Utah 84101

Re: *S.E.C. v. National Note of Utah, LC, et al.*, Case No. 2:12-cv-00591 BSJ

Dear Peggy:

As you are aware, this firm represents American Pension Services, Inc. ("APS"). APS is the administrator of self directed individual retirement accounts ("IRAs" or the "Administered IRAs"). A significant number of Administered IRAs provided invested funds with National Note of Utah, LC or its subsidiaries and affiliated entities ("National Note"). On June 25, 2012, Wayne Klein (the "Receiver") was appointed the receiver of National Note and various other entities pursuant to an "Order Appointing Receiver and Staying Litigation" in the above referenced case (the "Order Appointing Receiver"). On or about June 29, 2012, Judge Jenkins entered an order whereby Dorsey & Whitney, LLP were engaged to act as counsel for the Receiver.

On August 8, 2012, the Receiver posted on his official website a document entitled "Paying Custodial Fees for Retirement Accounts" which can still be accessed today at http://www.kleinutah.com/wp-content/uploads/2012/06/08.04.2012-IRA-Custodian-Alternatives-r.pdf (the "IRA Advice Posting"). I have previously contacted you and requested the Receiver to remove the IRA Advice Posting because certain IRA Holders may incur significant negative tax consequences if they follow the Receiver's advice. Despite my requests, the Receiver has not removed the IRA Advice Posting. The purpose of this letter is to inform the Receiver of the possible damages investors might incur due to the incomplete and incorrect advice contained in the IRA Advice Posting.

Before discussing the specific claims made and advice provided in the IRA Advice Posting, I thought it might helpful to provide some background relating to individual retirement accounts in general, the tax treatment of distributions from such accounts and the reporting requirements relating to such distributions. The summaries below are intended to be very brief overviews and do not purport to capture all of the rules, exceptions to rules, etc. that apply to such matters.

Types of IRAs in general:

Section 408 of the Internal Revenue Code ("IRC") defines two types of individual retirement accounts ("Traditional IRAs") and Roth individual retirement accounts are defined in IRC § 408A ("Roth IRAs"). Although similarities exist between Traditional IRAs and Roth IRAs there are also some significant differences. Given these differences, it is important for any advice relating to individual retirement accounts to identify the type of account to which it is directed (Traditional IRA or Roth IRA). The IRA Advice Posting fails to address this issue.

Individuals can establish both Traditional IRAs and Roth IRAs, but must designate the account's type at the time of its establishment. *See* IRC § 408A(b). Both Traditional IRAs and Roth IRAs must have a written governing instrument for the IRA. *See* IRC § 408(a) and Treas. Reg. § 1.408-2(b). The assets of both Traditional IRAs and Roth IRAs must be held in a trust or custodial account with a trustee or custodian that satisfies certain criteria prescribed by the Internal Revenue Service ("IRS"). *See* IRC §§ 408(a)(2), 408(h) and 408A(a). Importantly, an individual cannot serve as the trustee or custodian for either a Traditional IRA or a Roth IRA. *See* Treas. Reg. §§ 1.408-2(b)(2)(1) and 1.408-2(e). APS acts as the administrator and First Utah Bank acts as the custodian of both Traditional IRAs and Roth IRAs, which function the beneficiaries of such accounts cannot perform themselves.

Tax Treatment and Consequences for Distributions:

Although individuals can receive distributions from a Traditional IRA or Roth IRA at anytime, a 10% early withdrawal penalty is imposed upon various distributions. *See* IRC § 72(t)(2). The rules for determining whether a distribution is subject to the early withdrawal penalty are complex and extremely fact sensitive. However, the general rules are that distributions from a Traditional IRA are subject to the penalty if the account's beneficiary has not reached age 59½ and distributions from a Roth IRA are subject to the penalty if the account's beneficiary has not reached age 59½ or there has been less than five (5) years since the beneficiary or his spouse first made a Roth IRA contribution. *See* IRC §§ 72(t) and 408A(d)(2). There are numerous exceptions to these general rules. *See* IRC § 72(t)(2).

In addition to the foregoing 10% penalty, distributions from a Traditional IRA or Roth IRA may also be subject to income taxes. Whether a distribution is subject to income taxes depends upon a variety of factors. For example, distributions from a Traditional IRA or Roth IRA are not subject to income taxes (or the early withdrawal penalty discussed above regardless of whether the account beneficiary has reached age 59½ or one of the exceptions to the general rule applies) if they are "rolled" over into another qualified retirement plan in accordance with applicable requirements ("rollovers"). *See* IRC §§ 408(d)(3) and 402(c) for Traditional IRAs and IRC §§ 408A(e) and 402(c) for Roth IRAs. The types of qualified retirement plans to which

a distribution may be rolled over differ depending upon whether the distribution is from a Traditional IRA or a Roth IRA. *See e.g.*, IRC § 402(c)(8).

One of the key requirements for a distribution to qualify as a rollover is that the distribution generally must be transferred to another qualified retirement plan within sixty (60) days of receipt. *See* IRC §§ 408(d)(3)(A) and 408A(d)(3). There are, however, a varicty of narrow exceptions to this general rule. For example, the Internal Revenue Service ("IRS") may waive the sixty-day requirement if "failure to waive the requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement." IRC § 408(d)(3)(I). The IRS may also extend the deadline for completing the rollover for up to one year if the IRS determines that the recipient was affected by a federally declared disaster. *See* IRC § 7508 and Treas. Reg. § 301.7508A-1(c)(1)(iii). Finally, the sixty-day limit is extended during any period during which the distribution consists of a deposit that may not be withdrawn from a financial institution because of the bankruptcy or financial insolvency of the financial institution or a requirement imposed by the State in which the financial institution is located by reason of the institution's bankruptcy or financial insolvency. *See* IRC §§ 408(d)(3)(F) and 402(c)(7). These exceptions do not apply to the IRAs at issue in the National Note case.

Distributions that do not qualify as a rollover are treated very differently depending upon whether the distribution came from a Traditional IRA or a Roth IRA. Section 408(d)(1) provides that "[e]xcept as otherwise provided in this subsection, any amount paid or distributed out of [a Traditional IRA] shall be included in gross income by the payee or distribute." The exceptions to the general rule of taxability include rollovers, return of excess contributions within certain time limits, etc. Conversely, IRC § 408A(d)(1) provides that "[a]ny qualified distribution from a Roth IRA shall not be includible in gross income," with a qualified distribution generally defined as a distribution that is not subject to the early withdrawal penalty discussed above.

Reporting Requirements:

The trustee or custodian of a Traditional IRA or Roth IRA is required to "make such reports regarding such account . . . to the Secretary and to the individuals for whom the account . . . is, or is to be, maintained with respect to . . . distributions aggregating $10 or more in any calendar year . . . ." IRC § 408(i). *See also* IRC § 6047(d). Trustees and custodians use Form 1099-R to report such distributions to the IRS. *See* Treas. Reg. § 1.408-7(a). Any trustee or custodian who fails to file a Form 1099-R or who fails to include in such a form all of the information required to be included in the form is subject to penalties of up to $100 per form. *See* IRC §§ 6721.

Ponzi Scheme Losses:

The IRS has issued guidance relating to taxpayers who have lost money in Ponzi schemes both directly and indirectly through Traditional IRA and Roth IRA accounts. *See e.g.*, Rev. Rul. 2009-9, Rev. Proc. 2009-20 and IRS Information Letter 2009-154. Such guidance reaffirms that the general rules described above continue to apply in instances where the Traditional IRA or Roth IRA has lost money in a Ponzi scheme.

IRA Advice Posting:

The receiver advised the investors to close their IRA accounts and that a Form 1099-R should not be issued because the closure of the account is not a taxable event. The Receiver's advice, however, misstates the applicable law in several important respects and therefore is extremely misleading. In addition, investors who follow this advice may incur significant adverse tax consequences.

Closure of a Retirement Account May be a Taxable Event.

The advice that "closing" a retirement account is not a taxable event may not be true in many if not most circumstances. Although Mr. Klein does not expressly state what he means by "close" an account, it appears that he means to receive a distribution of all the account's assets. The Receiver's advice also does not anticipate a rollover of such distribution to another qualified retirement plan within the normal sixty (60) day time period (such a rollover would defeat the purpose of closing the account since the successor custodian would likewise charge a fee to manage the account), although he does anticipate a potential rollover of any funds recovered from National Note at a later date. Therefore, the Receiver is advising investors that a taxable event does not exist if they direct their custodians to close their account, distribute all of their account assets, and not roll over the distributions into another account within the proscribed sixty (60) day time limit.

As noted above, the IRS has not issued any formal guidance stating that the normal rules relating to the tax treatment of distributions from Traditional IRAs or Roth IRAs are in any way suspended or altered when the account has invested in a Ponzi scheme. Thus, the Receiver's advice that the closure of an account will not be a taxable event will only be correct for investors whose account has assets without any value. If the account has assets with value, then one must apply the various rules summarized above to determine whether a distribution is subject to either income taxes or the early withdrawal penalty. While there may be some investors with Roth IRAs that could close an account with value without being subject to any income taxes or penalties, most investors would be subject to either income taxes or penalties on the closure of an account with value. For example, an investor with a

Roth IRA who has not reached age 59½ or whose first Roth IRA contribution was less than five (5) years ago would be subject to both income taxes and penalties. An investor with a Traditional IRA who has not reached age 59½ would also be subject to both income taxes and penalties, while an investor with a Traditional IRA who has reached age 59½ would be subject to income taxes.

If the Receiver's advice is based on his belief that none of the investors' accounts have any value, please provide me with the facts that support this belief. It is the understanding of APS that there are investors' IRAs with value in investments other than National Note. Accordingly, closing the account would result in a distribution of the other investments and a taxable event will occur unless one of the exceptions discussed above applies. Even if one were to assume that none of the accounts held any assets other than their National Note investments (which would be a negligent assumption for the Receiver to make without verifying this assumption), it would still be inappropriate to assume that the accounts do not have any value whatsoever. Unless it is currently anticipated that Mr. Klein will be unable to recover any amount on behalf of the National Note claimants, such that the fair market value of the National Note investments can reasonably be reduced to zero, all of the accounts have some value. Of course, it is likely that each account holds assets other than the National Note investments and therefore has value independent of the National Note investments.

Assume, for example, that an investor who has not yet reached age 59½ has an account which contains a National Note investment with a face value of $50,000 and other assets with an aggregate value of $450,000. If that investor follows the Receiver's advice and directs his custodian to close his account and distribute all of the account's assets to the investor, not only will he have taxable income in an amount equal to the fair market value of all the distributed assets, but he will also owe a 10% early withdrawal penalty on such amount. Even if one assumes that the National Note investment has lost 95% of its value and therefore is only worth $2,500, the fair market value of the distribution would be $452,500. Assuming a 40% combined federal and state income tax rate, and including the 10% early withdrawal penalty, the investor would trigger $226,250 of taxes and penalties by closing his account.

The Receiver Incorrectly Advises Investors that the Closure of a Retirement Account does not require a Custodian to issue a Form 1099-R.

The Receiver incorrectly claims in his IRA Advice Posting that a custodian is not required to report the closing of a retirement account on a Form 1099-R and then attacks the character of custodians describing the reporting of a closure of an account on a Form 1099-R as a "threat" and "abusive practice of custodians." As summarized above, however,

custodians are required to report on Form 1099-R "distributions aggregating $10 or more in any calendar year." Custodians do not threaten to file 1099-R forms. They are required to file the forms. The Receiver's advice that closure of an account need not be reported on a Form 1099-R is only correct if the total distributions from the account for the year, including the distributions made upon closure of the account, were less than $10 in the aggregate. Again, APS is unaware of any reasonable basis for the Receiver to assume that each of the accounts had an aggregate value of less than $10 such that a distribution of all of the account's assets would not need to be reported on a Form 1099-R. Please provide me with the facts that the Receiver believes support this assumption and his claim that a Custodian issuing a Form 1099-R is an "abusive practice of custodians." In the event the Receiver does not have a factual basis supporting this defamatory statement, APS hereby requests the Receiver not only immediately remove the posting but post a retraction of his defamatory statement.

Assume again the same facts as in the example above (an investor closes an account containing $452,500 of assets – a $2,500 National Note investment and $450,000 of other investments), and assume further that no other distributions were made from the account during the year in which it is closed. The account's custodian would be legally required to issue a Form 1099-R reflecting a distribution of $452,500 and would be subject to a penalty if it failed to issue such a form or reported a distribution amount less than $452,500. Please explain to me the basis for the Receiver's public statement in his IRA Advice Posting attacking the character of custodians, who have merely told their clients that they will comply with the legally required reporting obligations upon the closure of an account.

The Receiver Incorrectly Advices Investors they can Rollover Distributions after More than 60 Days.

The IRA Advice posting provides misleading advice that the closure of a retirement account is not a taxable event in this case. The Receiver informs the investors that a taxable event will not take place because the IRS has the discretion to waive the sixty (60) day limit for rollovers and has elected to do so in connection with certain bankruptcy recoveries. First, this case is in Federal Court and is not a bankruptcy case. In addition, the practice referenced by the Receiver, which has been partially codified in IRC § 408(d)(3)(I), only applies in narrow circumstances and is not mandatory. The mere fact that such discretion exists does not guarantee that the IRS will exercise it with respect to any given investor. Moreover, while the IRS may be willing to waive the sixty (60) day requirement for a distribution consisting of nothing other than a National Note investment, there is no guarantee that it would agree to do so, and it is very unlikely that the IRS would waive the sixty (60) day requirement for any assets other than the National Note investment.

It also appears unlikely that the exception to the sixty (60) day requirement for frozen deposits set forth in IRC §§ 408(d)(3)(F) and 402(c)(7) would apply in this instance. The investors' National Note investments do not appear to be in the nature of deposits in a financial institution (such as savings account balances in a bank), so the frozen deposit exception likely would not apply even if a distribution consisted solely of the National Note investment, and the exception clearly would not apply to other assets which are not affected in any way by a bankruptcy or financial insolvency. Therefore, the sixty (60) day requirement would likely not be suspended because of the National Note case in Federal Court.

Assuming the same facts as in the example above, the investor may be able to convince the IRS to treat $2,500 of the distribution as a rollover when the investor receives his share of any bankruptcy recovery, but it is highly unlikely that the IRS would allow the entire $452,500 to so qualify simply because the distribution included the investor's National Note investment.

The Receiver Incorrectly Advises Investors that by closing their accounts they can avoid high custodial fees.

The Receiver's advice is based on information he apparently received from an investor who received information from an unidentified "IRS agent." First, it is remarkable that a Receiver would post legal advice to Investors based on hearsay information rather than legal research and advice. Second, all custodians operate with varied fee schedules established by contract with the individual beneficiary. These fees are enforced according to contract in most cases independent of the status of the asset. Third, to the extent the value of the assets is based on a fair market valuation, the fees can be reduced by the Receiver providing the custodians with his valuation of the National Note investments. Because of the tax-advantaged nature of the plans in question it is imperative that the fair market valuation of the asset(s) in question is completed according to the IRS business valuation guidelines as set forth in Revenue Ruling 59-60.Finally, although closing the accounts will result in the termination of administrative fees paid to the custodian, as discussed above, investors who follow the Receiver's advice may incur significant tax consequences that far exceed the administrative fees they are currently paying.

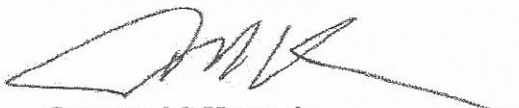
Accordingly, APS hereby formally requests the Receiver to do the following on or before 1 p.m., August 31, 2012: (1) retract and remove from the Receiver's website the IRA Advice Posting; (2) post a notice to investors that the IRA Advice Posting was not correct and they should seek independent advice; and (3) make a corrective statement curing his defamatory statements concerning custodian's alleged abusive practices and implication they are acting improperly by charging administrative fees, issuing Form 1099-Rs, etc. In the event the Receiver does not agree to this request and/or remove the IRA Advice Posting,

APS will file a motion seeking appropriate relief from the court to remove the IRA Advice Posting.

Please contact the undersigned if you have any questions or concerns.

Sincerely,

KIRTON McCONKIE



Cameron M. Hancock