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*Attorneys for Court-Appointed Receiver R. Wayne Klein*

**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><b>RECEIVER’S MOTION SEEKING AUTHORIZATION TO SELL ELKHORN RIDGE LOTS NOS. 4, 5 AND 48 FREE AND CLEAR OF PURPORTED INTERESTS AND MEMORANDUM IN SUPPORT</b></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”) of National Note of Utah, LC, its subsidiaries and affiliates, and the assets of Wayne LaMar Palmer, by and through his counsel, hereby files this Motion and Memorandum in Support, and respectfully requests that the Court enter an Order authorizing him to sell certain real properties of the Receivership Estate more fully described below as “Elkhorn Ridge Lot # 4,” “Elkhorn Ridge Lot #5” and “Elkhorn Ridge Lot # 48,” all located in Oneida County, near Malad, Idaho (collectively, the “Properties”). This Motion is supported by the *Declaration of Receiver R. Wayne Klein* (the

“Receiver Declaration”), which has been filed concurrently herewith.

At this time, the Receiver is aware that interests against each of the Properties exist, all of which are described in greater detail below, but the Receiver has concluded that those interests are without any basis in law or fact. However, in light of the interests asserted against the Properties, the Receiver is requesting the proposed sale of such Properties be authorized free and clear of any purported interests, with any valid interests attaching to the “Net Sale Proceeds” for each sale, as defined below.

The Securities and Exchange Commission (the “SEC”) has informed the Receiver that it does not object to the sales of the Properties. Accordingly, the Receiver hereby requests that the Court grant this Motion and authorize him to sell the Properties as proposed herein. In further support of this Motion the Receiver states as follows:

## **MEMORANDUM OF SUPPORT**

### **I.** **BACKGROUND**

1. On June 25, 2011, the above-captioned case was commenced by 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”).<sup>1</sup> 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.<sup>2</sup>
2. The Court has directed and authorized the Receiver to, among other things, do the following:

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<sup>1</sup> Docket No. 9 (Receivership Order), *as amended*, Docket No. 50.

<sup>2</sup> *See generally, id.*

- “[D]etermine the nature, location and value of all property interests of the Receivership Defendants and the Palmer Entities . . . [.]”<sup>3</sup>
- “To take custody, control and possession of all Receivership Property and records . . . [.]”<sup>4</sup>
- “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[.]”<sup>5</sup>
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities . . . .”<sup>6</sup>
- “[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 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.”<sup>7</sup>
- “[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.”<sup>8</sup>
- “[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.”<sup>9</sup>

## **II.** **REAL PROPERTY TO BE SOLD**

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.<sup>10</sup>

4. Relevant to the present Motion are certain parcels of real property located in

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<sup>3</sup> *Id.* at ¶ 7(A).

<sup>4</sup> *Id.* at ¶ 7(B).

<sup>5</sup> *Id.* at ¶ 7(D).

<sup>6</sup> *Id.* at ¶ 19.

<sup>7</sup> *Id.* at ¶ 37.

<sup>8</sup> *Id.* at ¶ 38.

<sup>9</sup> *Id.* at ¶ 39.

<sup>10</sup> Receiver Declaration ¶ 4.

Oneida County, near Malad, Idaho more fully described below.

**The Elkhorn Ridge Subdivision**

5. Through this Motion, the Receiver is seeking to sell two parcels from that 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 lots (the “Cabin Lots”) of the forty-seven remaining, 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 that purchasers of the lots will need to install wells and septic tanks.<sup>11</sup>

6. 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.<sup>12</sup>

7. 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.<sup>13</sup>

8. The Zoning Commission conditionally granted the variance, allowing one lot to

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<sup>11</sup> Receiver Declaration ¶ 5.

<sup>12</sup> Receiver Declaration ¶ 6.

<sup>13</sup> Receiver Declaration ¶ 7.

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.<sup>14</sup> A copy of the variance Application and approval is attached as Exhibit 1 to the Receiver Declaration.

9. The fence has now been constructed and the other conditions are close to being met, but the sale of additional lots is conditioned on the approval of the Zoning Commission.<sup>15</sup>

### **Marketing of the Elkhorn Properties**

10. 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.<sup>16</sup> A copy of the listing agreements are attached as Exhibit 2 and Exhibit 3 to the Receiver Declaration

11. To determine an offering price for each of the Properties and to comply with his duties, the Receiver consulted with his experienced independent real estate broker, and obtained appraisals for each of the Properties, copies of which are attached to the Receiver Declaration as Exhibit 4 (Lot #4), Exhibit 5 (Lot # 5), Exhibit 6 (2<sup>nd</sup> appraisal of Lot #5) and Exhibit 7 (Lot #48), respectively. In addition, the Receiver is in the process of obtaining additional appraisals, and he will have copies of those appraisals prior to any hearing on this matter.<sup>17</sup>

12. The properties were listed for sale on the multiple listing service, and have been actively marketed by the realtor.<sup>18</sup>

### **The Properties to Be Sold and the Purchase Agreements**

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<sup>14</sup> Receiver Declaration ¶ 8.

<sup>15</sup> Receiver Declaration ¶ 8.

<sup>16</sup> Receiver Declaration ¶ 9.

<sup>17</sup> Receiver Declaration ¶ 10.

<sup>18</sup> Receiver Declaration ¶ 11.

13. The Properties at issue in the present Motion are 2 of the 3 Cabin Lots (Elkhorn Ridge Lot # 5 and Lot # 48),<sup>19</sup> which have partially built cabins, and one of the empty lots (Elkhorn Ridge Lot # 4).<sup>20</sup>

14. The legal description for Elkhorn Ridge Lot #4 is as follows:

Lot 4, Elkhorn Ridge Estates, Recorded in Oneida County, Idaho, Recorder's office on September 17, 2007 as instrument number 141595

15. The legal description for Elkhorn Ridge Lot #5:

Lot 5, Elkhorn Ridge Estates, Recorded in Oneida County, Idaho, Recorder's office on September 17, 2007 as instrument number 141595

16. The legal description for Elkhorn Ridge Lt 48 is as follows:

Lot 48, Elkhorn Ridge Estates, Recorded in Oneida County, Idaho, Recorder's office on September 17, 2007 as instrument number 141595

17. On or about November 2, 2012, the Receiver reached an agreement with a party who had submitted an offer to purchase Elkhorn Ridge Lot # 48 for the full appraised value of \$80,000.00 (the "Lot # 48 Purchase Agreement").<sup>21</sup> A copy of the Lot #48 Purchase Agreement is attached to the Receiver's Declaration as Exhibit 8.

18. On or about November 18, 2012, the Receiver reached an agreement with a party who had submitted an offer to purchase Elkhorn Ridge Lot # 4 for \$35,000.00 (the "Lot # 4 Purchase Agreement"), which amount represents approximately 93% of Lot #4's appraised value of \$37,500.00.<sup>22</sup> A copy of the Lot #4 Purchase Agreement is attached as Exhibit 9 to the Receiver Declaration.

19. On or about December 27, 2012, the Receiver reached an agreement with a party

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<sup>19</sup> The Receiver previously has sought authorization to sell the third Cabin Lot by separate motion.

<sup>20</sup> Receiver Declaration ¶ 12.

<sup>21</sup> Receiver Declaration ¶ 13 & Exh. 7 (Lot #48 Appraisal).

<sup>22</sup> Receiver Declaration ¶ 13 & Exh. 4 (Lot # 4 Appraisal).

who had submitted an offer to purchase Elkhorn Ridge Lot # 5 for \$80,000.00 (the “Lot # 5 Purchase Agreement” and together with the Lot #48 and Lot #4 Purchase Agreements, the “Purchase Agreements”). Based on the appraised values of this Lot #5 from the appraisals obtained to date, *see* Receiver Declaration Exhibit 5 and Exhibit 6, the average appraised value of Lot #5 is approximately \$88,000.00. The Receiver thus has accepted an offer that is approximately 90% of Lot #5’s average appraised value.<sup>23</sup>

20. The Purchase Agreements have been negotiated by the Receiver with the prospective purchasers in good faith and at arms’ length.<sup>24</sup>

#### **Material Terms of the Sales**

21. As proposed in the Purchase Agreements, subject to Court approval, the Receiver will sell: (a) Elkhorn Ridge Lot # 4 to the purchaser for a purchase price of \$35,000.00; (b) Elkhorn Ridge Lot # 5 to the purchaser for a purchase price of \$80,000.00; and (c) Elkhorn Ridge Lot # 48 to the purchaser for a purchase price of \$80,000.00.

22. Earnest money deposits in the amount of \$500.00 have been made by each of the prospective purchasers, the proposed sales are as is where is with no representations or warranties.<sup>25</sup>

#### **Sale Costs and Net Sale Proceeds**

23. The Receiver anticipates paying the ordinary costs of the sales at the time of closing of the respective sales, including taxes, market-rate closing costs and a standard commission as set forth in the Listing Agreements.<sup>26</sup>

24. Furthermore, as discussed above, the Receiver’s ability to sell the Properties is

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<sup>23</sup> Receiver Declaration ¶ 14.

<sup>24</sup> Receiver Declaration ¶ 15.

<sup>25</sup> Receiver Declaration ¶ 16.

<sup>26</sup> Receiver Declaration ¶ 17 & Exhs. 2-3 (Listing Agreements).

conditioned, in part, on his compliance with the Zoning Commission's variance. Under that variance, the Receiver is required to use sale proceeds to pay for the installation of the perimeter fence and back taxes for the subdivision. The Receiver believes that the conditions of the variance have been met, but he is still waiting on formal approval from the Zoning Commission to sell the Properties.<sup>27</sup>

25. Any interests against the Properties other than the closing costs and costs with complying with the variance 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 costs associated with the variance (respectively, the "Lot # 4 Net Sale Proceeds," "Lot # 5 Net Sale Proceeds" and "Lot # 48 Net Sale Proceeds," collectively, the "Net Sale Proceeds").<sup>28</sup>

26. The Receiver will separately account for the Net Sale Proceeds pending resolution of any disputes related to interests claimed against the respective Properties.<sup>29</sup>

### **Free and Clear Sale of the Properties**

27. The Receiver proposes to sell the Properties free and clear of all interests therein, with any interests that may exist attaching to each Property's 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 the Properties or to the Net Sale Proceeds from each sale.<sup>30</sup>

28. To determine interests, if any against the Properties, the Receiver obtained a preliminary title report with respect to each Property (the "Title Reports"), copies of which are

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<sup>27</sup> Receiver Declaration ¶ 18.

<sup>28</sup> Receiver Declaration ¶ 19.

<sup>29</sup> Receiver Declaration ¶ 20.

<sup>30</sup> Receiver Declaration ¶ 21.



attached as Exhibit 10 (Lot #4), Exhibit 11 (Lot #5) and Exhibit 12 (Lot #48) to the Receiver Declaration.<sup>31</sup>

29. According to the Title Report for Elkhorn Ridge Lot # 4, the following exceptions to title exist:

- (a) property taxes in the total principal amount of \$10.48 for 2010-2012;
- (b) a Deed of Trust dated January 4, 2008 by and between Elkhorn Ridge, LLC (“ER”), which is one of the Palmer Entities included in the Receivership Order, as trustor, in favor of National Note, as beneficiary (the “Lot # 4 Insider Deed of Trust”);
- (c) an “Assignment of Beneficial Interest in Trust Deed for Security” (“ABI”) issued to investors Kay or Sharon Butters (“Butters”) purporting to provide Butters with a beneficial interest in the Lot # 4 Insider Deed of Trust to secure their investment with NNU; and
- (d) an ABI issued to investor John Huestis (“Huestis”) purporting to provide Huestis with a beneficial interest in the Lot # 4 Insider Deed of Trust to secure his investment with NNU.<sup>32</sup>

30. According to the Title Report for Elkhorn Ridge Lot # 5, the following exceptions to title exist:

- (a) property taxes in the total principal amount of \$218.54 for 2010-2011;
- (b) a Deed of Trust dated January 4, 2008 by and between ER, as trustor, in favor of National Note, as beneficiary (the “Lot # 5 Insider Deed of Trust”);

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<sup>31</sup> Receiver Declaration ¶ 22.

<sup>32</sup> Receiver Declaration Exh. 10 (Lot # 4 Title Report).

(c) an ABI issued to investor Darlene G. Ellefsen (“Ellefesen”) purporting to provide her with a beneficial interest in the Lot # 5 Insider Deed of Trust to secure its investment with NNU.<sup>33</sup>

31. According to the Title Report for Elkhorn Ridge Lot # 48, the following exceptions to title exist:

- (a) property taxes in the total principal amount of \$218.54 for 2010-2011;
- (b) a Deed of Trust dated January 4, 2008 by and between ER, as trustor, in favor of National Note, as beneficiary (the “Lot # 48 Insider Deed of Trust”);<sup>34</sup> and
- (c) an ABI issued to investor Harvest Time Ministries (“Harvest”) purporting to provide Harvest with a beneficial interest in the Lot # 48 Insider Deed of Trust to secure its investment with NNU.<sup>35</sup>

32. The Receiver does not believe that the ABI interests described above are valid or have any effect as a matter of law, but to the extent that they continue to be asserted, the Receiver proposes that the sale of the Properties be allowed with any interests that may exist pursuant to the ABIs, attaching to the Net Sale Proceeds from the relevant sale.<sup>36</sup> In the case of the Butters, they have been paid their principal investment in NNU in full, and therefore no longer have any right to assert an interest in the Properties.<sup>37</sup> The remaining persons described above obtained no interest in the Properties through their ABIs as a matter of law.

33. A copy of the Motion and the Declaration are being served on the relevant taxing authorities, Butters, Huestis, Ellefsen, and Harvest.

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<sup>33</sup> Receiver Declaration Exh. 11 (Lot #5 Title Report).

<sup>34</sup> The Title Report for Elkhorn Ridge Lot # 48 lists Lot # 48 Deed of Trust as being dated on January 4, 2009. In light of the recording date of January 22, 2008, the January 4, 2009 date is in error.

<sup>35</sup> Receiver Declaration Exh. 12 (Lot # 48 Title Report).

<sup>36</sup> Receiver Declaration ¶ 23.

<sup>37</sup> Receiver Declaration ¶ 24.

**Best Interests**

34. The Receiver believes that the sales of the Properties as proposed are beneficial for and in the best interests of the Receivership Estate based on the appraised values Properties and the purchase price obtained through good faith and arms' length negotiations.<sup>38</sup>

35. Sale of Elkhorn Ridge Lots # 5 and # 48 as proposed will result in finishing two additional cabins,<sup>39</sup> and having another occupant establish residency in the subdivision, which it is hoped will facilitate the sale of the remaining lots.<sup>40</sup>

36. Sale of the Properties will also slightly reduce the burden to the Receivership Estate by reducing the time spent by the Receiver in managing the lots, as well as costs associated with the property.<sup>41</sup>

37. The SEC has been informed of the material terms of the sales, and has no objection thereto.<sup>42</sup>

**Publication Notice**

38. Contemporaneously herewith the Receiver is filing his *Ex Parte Motion for Order Approving Method and Form of Publication Notice of Sale of Real Properties*, seeking the Court's approval of the method and form of proposed publication notice.

39. Upon entry of an Order granting the Publication Motion, the Receiver shall publish notice of the proposed sales in *The Idaho Enterprise*, a newspaper published in Malad City, Idaho, using the method and form of notice approved by the Court.<sup>43</sup>

**III.**

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<sup>38</sup> Receiver Declaration ¶ 25.

<sup>39</sup> The Receiver is currently seeking Court approval of the sale of Elkhorn Ridge Lot # 1, which has another partially built cabin located on it.

<sup>40</sup> Receiver Declaration ¶ 26..

<sup>41</sup> Receiver Declaration ¶ 27.

<sup>42</sup> Receiver Declaration ¶ 28.

<sup>43</sup> Receiver Declaration ¶ 29.

## **ARGUMENT**

Based on the facts above, the Receiver respectfully requests authorization to sell the Properties pursuant to the Purchase Agreements free and clear of liens and interests, with any such interests, to the extent that they exist, attaching to the Net Sale Proceeds for each Property and held by the Receiver pending resolution of any disputes related thereto. Sale of Properties 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 the Properties.<sup>44</sup>

### **Sale of the Properties 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 Properties 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 of the Properties. Specifically, the Properties been marketed at an offering price that is based on (a) the opinion of an experienced, third party realtor, and (b) independent appraised values of the property. The appraisals have taken into consideration current market conditions, sales of comparable properties, and the particular nature of the properties. The Purchase Agreements

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<sup>44</sup> Receivership Order ¶ 38.

propose purchase prices that are very close to the appraised values, and based on input of the realtor, not a discounted or liquidation value of the Properties.

*Second*, the proposed sales will result in the completion of at least two more cabins, which it is hoped will in turn facilitate the sale of the remaining 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.

*Finally*, the proposed sales will reduce, albeit slightly, the burden on the Receivership Estate. The Receiver will no longer have to spend time managing the Properties, and the Receivership Estate will no longer have obligations related to paying taxes on and other maintenance and upkeep expenses related to the Properties.

**Request To Sell the Properties Free and Clear of Interests**

As discussed above, the Receiver proposes to sell the Properties 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 proper notice.

At this time, there do not appear to be any valid interests against the Properties, but those who potentially could be deemed to have an interest, specifically Ellefsen, Butters, Huestis, and Harvest 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 interests claimed against the Properties.

**Compliance With 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.<sup>45</sup> 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.”<sup>46</sup> Here, the Receiver has complied with each of these factors, to the extent that they exist.

Specifically, factor (1) is met in this case inasmuch as the purchase price for Elkhorn Ridge Lot # 4 is approximately 93% of its appraised value, the purchase price of Elkhorn Ridge Lot # 5 is approximately 90% of its average appraised value, and the purchase price for Elkhorn Ridge Lot # 48 is 100% of the appraised value. Accordingly, the purchase prices far exceed the 2/3 requirement.

Factor (2) is met because the Receiver has obtained the opinion of an experienced, third party realtor and appraisals of the Properties. Based on the appraisals that he has obtained and the broker’s opinion that he has received, the Purchase Agreements do not propose sales at a price less than two-thirds of the appraised value. Additional appraisals are being obtained, and the Receiver will have them prior to any hearing on this Motion.

Factor (3) has been met as the Receiver will publish notice of the proposed sale

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<sup>45</sup> Receivership Order ¶ 39.

<sup>46</sup> 28 U.S.C. § 2001(b).

immediately upon the Court's entry of an Order approving the method and form of such notice.

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 to purchase either one of the Properties that: (a) is in compliance with § 2001(b) as quoted above, and (b) exceeds the purchase prices stated in the Purchase Agreements by 10% or more.

**CONCLUSION**

For the foregoing reasons, the Receiver requests that the Court grant the Motion, thus authorizing the sale of the Properties pursuant to the Purchase Agreements free and clear of purported interests.

DATED this 28th day of December, 2012.

**DORSEY & WHITNEY LLP**

*/s/Peggy Hunt*

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