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**IN THE UNITED STATES OF DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NATIONAL NOTE OF UTAH, LC, a Utah Limited  
Liability Company and WAYNE LaMAR PALMER,  
an individual,

Defendants.

**MEMORANDUM IN OPPOSITION TO  
RECEIVER'S SECOND MOTION SEEKING  
AUTHORIZATION TO SELL ELKHORN  
RIDGE CABIN LOT FREE AND CLEAR OF  
PURPORTED INTERESTS**

2:12-CV-00591 BSJ

The Honorable Bruce S. Jenkins

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Defendants National Note of Utah, LC and Wayne LaMar Palmer (collectively, “**Defendants**”), by and through undersigned counsel hereby submit this Memorandum in Opposition to Receiver’s Second Motion Seeking Authorization to Sell Elkhorn Ridge Cabin Lot Free and Clear of Purported Interests.

As described more fully below, Defendants oppose authorization of the sale because the clearly established requirements of 28 USC § 2001 have not been met. Specifically, R. Wayne Klein, the Court-Appointed Receiver (the “**Receiver**”) failed to ask this Court to appoint three

independent appraisals prior to negotiating a sales price with prospective purchasers, signing the Purchase Agreement, and submitting the proposed sale for this Court's approval.

### INTRODUCTION

This Court's June 25, 2012 *Order Appointing Receiver and Staying Litigation* ("**Receivership Order**") charged the Receiver with, among other things, the responsibility to "Sell 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." Docket No. 9 (Receivership Order), *as amended*, Docket No. 50 at ¶ 39.

Pursuant to this Receivership Order, Receiver signed a purchase agreement (the "**Purchase Agreement**") for the sale of certain real property identified as Elkhorn Ridge Lot #1, located in the Elkhorn Ridge subdivision, Oneida County, Idaho (the "**Property**") in consideration for a purchase price of \$130,000.00. Prior to executing the Purchase Agreement, Receiver failed ask this Court to appoint three disinterested appraisals of the Property. (Rec. Sec. Mot. at ¶ 9.)

As of the date of this filing, we do not have three independent appraisals, and have no way to verify the accuracy of those appraisals. As far as we know, the Receiver has negotiated a purchase price and is now shopping various appraisers until he finds threethat will support the current purchase price.

**ARGUMENT**

**I. BECAUSE THE RECEIVER FAILED TO OBTAIN THREE INDEPENDENT APPRAISALS, AS REQUIRED BY 28 USC § 2001, RECEIVER'S MOTION SHOULD BE DENIED.**

United States Code Title 28, Section 2001 establishes certain procedural requirements that the Receiver must follow in selling receivership property, and provides in relevant part:

After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, **the court shall appoint three disinterested persons to appraise [the] property....**No private sale shall be confirmed at a price less than two-thirds of the appraised value.

28 U.S.C. § 2001.

Thus, according to federal statute, the Receiver is obligated to ask this Court to appoint three disinterested persons to appraise the Property. However, despite this clear mandate, the Receiver failed to get an order from the Court, has failed to show the current appraiser is disinterested, and has failed to get two additional appraisers. Notwithstanding the Receiver's disregard for the statute, he has signed a Purchase Agreement and submitting the proposed sale for this Court's approval. This current appraiser valued the property at \$135,000.00. Because the agreed upon sales price is \$130,000.00, or 96.2% of the appraised value, the Receiver asserts that he is in compliance with 28 USC § 2001's requirement that the sales price be at least two-thirds of the appraised value. By statute, because the Court has not appointed three independent appraisers, the Court cannot determine that the sale price is 96.2% of the appraised value.

Despite the Receiver's clear disregard for the requirements of section 2001, the Receiver maintains that he complied with 28 USC 2001's three independent appraisal requirement because

the Receiver “has ordered two additional appraisals, which he will have prior to any hearing on this matter.” (Rec. Sec. Mot. at p. 14.) This strategy however undermines the spirit of 28 USC § 2001 and jeopardizes the integrity of these two additional appraisals. If the Court were to allow the Receiver to approach every sale in this manner there is nothing to stop the Receiver from shopping appraisers until he finds three that place the value at the sales price. Even if the Receiver intends no nefarious conduct — and this memorandum does not suggest the Receiver has any nefarious intent — by locking in a sales price prior to seeking appraisals, the Receiver gives the appraisers a target to hit. In contrast, the procedure contemplated by the § 2001 contemplates that three disinterested appraisers will provide unsolicited values of property **prior** to the confirmation of any sale.

The spirit underlying 28 USC § 2001 clearly contemplates three independent and disinterested appraisals averaged together to determine the appraised value. Only after the appraised value is fully established should receivers seek to enter into negotiations and sales contracts. In the instant matter, the two appraisers who will calculate their valuations of the Property after knowing that the Purchase Agreement has been executed, cannot be considered independent or disinterested. They face implied pressure to bring their appraisals in line with the Purchase Agreement price of \$130,000.00, or risk loss of future business with the Receiver.

Further, Defendants object to the sale of the property in its current condition. The current appraiser gave a 25% discount to the value of the Property due to unfinished items on the cabin. The cost to finish and repair the unfinished items would cost much less than the 25% discount given by the appraiser. It would be more economical to finish the cabin and obtain the full value for the unit. This will further benefit the estate because it will set the benchmark for the rest of the units to be sold in the subdivision.

**CONCLUSION**

Because the Receiver failed to obtain three disinterested appraisals prior to negotiating a sales price with prospective purchasers, signing the Purchase Agreement, and submitting the proposed sale for this Court's approval, the Receiver failed to comply with the requirements of 28 USC § 2001. Additionally finishing the cabin prior to seeking appraisals will provide more long-term benefit to the estate than selling the Property at a substantially discounted price. Therefore, Defendants respectfully request the Court to deny Receiver's Second Motion Seeking Authorization to Sell Elkhorn Ridge Cabin Lot Free and Clear of Purported Interests.

DATED this 28<sup>th</sup> day of December, 2012.

PIA ANDERSON DORIUS REYNARD & MOSS, LLC

*/s/ Brennan H. Moss*

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Brennan H. Moss

Nathan S. Dorius

*Attorneys for Defendants*