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

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

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

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

Defendants.

**RECEIVER'S REPLY TO LISA  
SANDERS SHAH'S, KRISTINE S.  
OLSON'S, AND THE KRISTINE S.  
OLSON PROFIT SHARING PLAN'S  
RESPONSE TO THE RECEIVER'S  
MOTION REQUESTING  
DISALLOWANCE OF PROOFS OF  
CLAIM**

**(Proof of Claim Nos. 1320, 1321,  
1401 and 1402)**

Civil No. 2:12-00591

The Honorable Bruce S. Jenkins

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R. Wayne Klein, as receiver (the "Receiver") for Defendant National Note of Utah, LC, and the assets of Defendant Wayne LaMar Palmer, by and through his counsel of record, hereby files this *Reply* to the *Response to the Receiver's Motion Requesting Disallowance of Proofs of Claim* (the "Objection") filed on behalf of Lisa Sanders Shah ("Shah"), Kristine S. Olson ("Olson") and the Kristine S. Olson Profit Sharing Plan (the "Olson Plan") (collectively, the

“Claimants”),<sup>1</sup> objecting to the *Receiver’s Motion Requesting Disallowance of Proofs of Claim and Memorandum of Law in Support* (the “Claims Disallowance Motion”).<sup>2</sup> Unless otherwise stated, all capitalized terms are as defined in the Motion.

For the reasons stated herein and in the Claims Disallowance Motion, the Receiver respectfully requests that the Court overrule the Claimants’ Objection and grant the Claims Disallowance Motion, disallowing in their entirety Claimants’ Proofs of Claim designated as Proof of Claim No. 1320 submitted by Olson (the “POC 1320”), Proof of Claim No. 1321 submitted by the Olson Plan (the “POC 1321”), and Proof of Claim No. 1401 submitted by Shah (the “POC 1401”) (collectively, the “Contested Proofs of Claim”).

For the reasons discussed below, since the filing of the Claims Disallowance Motion, the parties have agreed that Proof of Claim No. 1402 (the “POC 1402”), a second Proof of Claim filed by Shah, should be allowed in a reduced amount. Thus, the Receiver requests that POC 1402 be held to be an allowed claim in the reduced amount of \$433,453.35.

## I.

### **BACKGROUND**

#### *The Claimants’ Investments and ABIs*

1. The Claimants each invested funds with National Note.
2. Shah made two investments with National Note, one for which she received an Assignment of Beneficial Interest (“ABI”) from National Note, and one for which she did not.
3. Olson and the Olson Plan each made an investment with National Note and each received ABIs from National Note in conjunction with those investments.<sup>3</sup>

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<sup>1</sup> Docket No. 1113.

<sup>2</sup> Docket No. 1092.

4. The Receiver has maintained throughout this case that the ABIs are invalid and of no effect.

5. In approximately June 2013, the Receiver served each of the ABI holders in this case, including the Claimants, with letters requesting that voluntarily release their ABIs. A sample of this letter has been attached as Exhibit 1 to the Claimants' Objection (the "Voluntary Release Letter"). To assure ABI holders who released their ABIs that they still would have an opportunity to recover from the Receivership Estate in the event of release – the Receiver stated that while he did not believe that the ABIs give rise to an interest in property, "that does not mean that you do not have a valid claim to participate in funds I recover. While the ABIs do not represent a valid security interest in the Property, your claim against National Note *may* still exist, but as an unsecured claim."<sup>4</sup>

#### The ABI Action

6. Many ABI holders voluntarily released their ABIs in response to the Voluntary Release Letter, but others did not. For all holders who did not, the Receiver commenced suit against them to invalidate the ABIs. Relevant to this matter is the lawsuit filed by the Receiver against the Claimants and others designated as *Klein v. Adams et al.*, Civ. No. 2:14-00614 (D. Utah) (the "ABI Action").

7. At this time, as a result of voluntary releases, settlements, and the entry of default judgments invalidating ABIs, only five defendants remain in the ABI Action. These defendants include the Claimants. Motions for summary judgment have been fully briefed and argued as to

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<sup>3</sup> Olson made other investments with National Note that are not relevant to the present matter. Those investments were secured by deeds of trust on certain lots in the Almond Heights subdivision, and she was paid in conjunction with those investments when the lots sold based on her position as a secured creditor.

<sup>4</sup> Objection, Exh. 1 (Voluntary Release Letter, p. 2).

each of the defendants, except one who was recently added as a defendant in the ABI Action. A motion seeking entry of a default certificate was recently filed by the Receiver as to that defendant, and the Receiver anticipates that upon entry of default judgment, the pending motions for summary judgment will be ripe for decision.

*Claim Procedures Order and Compliance*

8. On September 1, 2015, the Court entered Claim Procedure Order, approving, among other things, the Bar Date Notice, and setting November 3, 2015 as the Bar Date for claimants to file Proofs of Claim.<sup>5</sup>

9. The Bar Date Notice and a Proof of Claim form were served on the Claimants, and in response, the Claimants timely submitted their respective Proofs of Claim.

*The Claimants' Proofs of Claim*

10. On October 27, 2015, Olson submitted POC 1320 to the Receiver, asserting a claim in the amount of \$277,582.19 based on her investment with National Note. POC 1320 involves an investment with National Note that Olson maintains is secured by an ABI.

11. On October 27, 2015, the Olson Plan submitted POC 1321, asserting a claim in the amount of \$52,744.79 based on its investment with National Note. POC 1321 involves an investment with National Note that the Olson Plan maintains is secured by an ABI.

12. On November 1, 2015, Shah submitted POC 1401, asserting a claim in the amount of \$316,871.23 based on her investment with National Note.<sup>6</sup> POC 1401 involves an investment with National Note that Shah maintains is secured by an ABI.

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<sup>5</sup> Docket No. 999 (Claim Procedure Order).

<sup>6</sup> If this Proof of Claim is allowed by the Court, the Receiver believes the appropriate amount of the Claim should be \$310,751.23. Shah admits in POC 1401 receiving \$83,128.77 in distributions from a principal investment amount of \$400,000.00. The Receiver's records show

13. On November 1, 2015, Shah and Jiten D. Shah submitted POC 1402, asserting a claim in the amount of \$466,876.04 based on an investment with National Note. POC 1402 involves an investment with National Note that does not involve an ABI.<sup>7</sup>

*The Claims Disallowance Motion and the Stipulation on POC 1402*

14. On March 14, 2016, the Receiver filed the Claims Disallowance Motion, recommending that, among others, each of the above-described Proofs of Claim be disallowed because the Claimants claimed interests in real estate of the Receivership Estate.<sup>8</sup> The Receiver further stated as follows:

The Receiver is recommending that the Proofs of Claim of persons who assert interests against real property of the Receivership Estate be disallowed inasmuch as the holder of the interest has not released its interest and thus is asserting duplicate interests against property of the estate. Each of these claimants appear to have elected to seek recovery based on his or her interest, if any, recorded against property and, thus, his or her respective interests should be disallowed.<sup>9</sup>

15. On April 7, 2016, the Claimants filed the present Objection in response to the Claims Disallowance Motion.

16. Since the filing of the Objection, the parties have agreed that Shah's POC 1402 relates to an investment that does not involve an ABI and, therefore, the Receiver is no longer recommending that POC 1402 be disallowed. Rather, the Receiver is recommending that POC 1402 be allowed at the reduced amount of \$433,453.35, and Shah agrees with this amount based on payments she received from National Note.

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that distributions in the amount of \$89,248.77 were actually made to her by National Note on this investment, resulting in a net principal investment amount of \$310,751.23.

<sup>7</sup> Jiten Shah has not objected to the Claims Disallowance Motion. *See* Objection. Given the stipulation set forth herein recommending that POC 1402 be allowed in a reduced amount, this fact does not appear to be of consequence.

<sup>8</sup> *See* Claims Disallowance Motion, Exh. A.

<sup>9</sup> Claims Disallowance Motion, p. 8.

**II.**

**RELIEF REQUESTED**

17. For the reasons stated in Part III below, the Receiver requests that the Court enter an Order granting the Claims Disallowance Motion and disallowing Contested Proofs of Claim, POC 1320, 1321 and 1401, in their entirety.

18. Furthermore, based on the agreement set forth above, the Receiver requests that the Court enter an Order allowing POC 1402 (which does not involve an ABI) in the reduced of \$433,453.35.

**III.**

**REPLY**

19. The Contested Proofs of Claim, POC 1320, POC 1321 and POC 1401, should be disallowed in their entirety.

20. The Claimants state that their Proofs of Claim should be allowed based on equity. Specifically, (a) the Receiver recognized a potential claim in the Voluntary Release Letter sent to ABI holders prior to the commencement of ABI Action; (b) the Claimants have defended the validity of their ABIs in good faith; and (c) the Claimants are victims and if their ABIs are determined to be invalid, they should be permitted to seek recovery like other victims.<sup>10</sup>

21. The Receiver believes equity actually favors disallowance of the Contested Proofs of Claim.

22. From the outset of this case, the Receiver has consistently maintained that the ABIs are invalid as a matter of law and based on that position he has requested that the select investors holding ABIs release them to avoid litigation expense and to increase the pool of funds

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<sup>10</sup> Objection, pp. 6-7.

available for distribution to those who lost their principal investment. While Claimants have the right to contest this position, in so doing, they have effectively elected to be treated as secured creditors in this case. This election has been at the expense of the hundreds of “unsecured” claimants who were not fortunate (or persistent) enough to obtain ABIs or deeds of trust from National Note, or who voluntarily agreed to release their ABIs for the good of all before commencement of the ABI Action or upon service of the summons in that Action.

23. The Receivership Estate, and thus investors, has been forced to incur costs to preserve and dispose of the properties that the Claimants assert they have an interest in as well as to litigate with the Claimants who hope to recover significantly more than fellow investors. Given these circumstances it appears unfair to the Receiver to allow the Claimants a “back up” plan in the event that the ABIs are ultimately found to be invalid as argued by the Receiver. Thus, equity actually favors treating the Claimants’ ABI position, along with the position of the other ABI holders/litigants who have filed Proofs of Claim, as an election to seek recovery as a secured creditor and disallowing the Contested Proofs of Claim seeking recovery from general funds.<sup>11</sup>

24. The Receiver’s recommendation is supported by the fact that the claims process is intended to be the “Exclusive Recovery Method” to recover funds from the Receivership Estate.<sup>12</sup> All potential claimants were informed that participation in the claims process was to constitute the exclusive means of seeking a share of recovered funds.<sup>13</sup> Here, Claimants are

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<sup>11</sup> See Claims Disallowance Motion, Exh. A (the Receiver has objected to all Proofs of Claims filed by claimants who did not release their ABIs prior to commencement of the ABI Action or upon service of the summons).

<sup>12</sup> Claim Procedure Order, Exh. 2 (Court-Approved Instructions for Proof of Claim Form). For convenience, a copy of the Instructions are attached hereto as **Exhibit A**.

<sup>13</sup> *Id.*

seeking to obtain a distribution from the Receivership Estate through both the claims process and the ABI Action – using the claim process as a “back-up” in the event that they are not successful in the ABI Action.

25. Contrary to the Claimants’ arguments, the Voluntary Release Letter does not contain inconsistent representations. The Voluntary Release Letter was served on all ABI holders prior to the commencement of the ABI Action. The statement relied on by the Claimants, quoted above, was made by the Receiver to assure holders that they could still assert claims if their ABIs were released—that a voluntary release of the ABI was not a release of claims. It does not guarantee a claim in any way to anyone.

26. Finally, the Receiver notes that the Claimants’ intent as to the claims they are asserting is not entirely clear. The Receiver recommended disallowance of the Proofs of Claim in part because, taken at face value, the Contested Proofs of Claim and the Claimant’s arguments in the ABI Action appeared to be a request for duplicate recovery – both from the ABIs and through a distribution of general funds. The Receiver recognizes that the Claimants have now attempted to clarify their intent, maintaining that the Contested Proofs of Claim are filed only to assert claims in the event that their ABIs are declared to be invalid and unenforceable in the ABI Action.<sup>14</sup> As discussed above, the Receiver does not believe that this position is well-taken or fair. It also does not clarify what the Claimants are seeking. The Receiver believes that the Claimants are now saying that if the ABIs are determined to be valid by this Court in the ABI Action, they will not seek any recovery from the Receivership Estate, except from what they can recover through their ABIs – even if their recovery from the encumbered property is less than their net principal loss. If the Claimants intend anything different, they should make this clear

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<sup>14</sup> Objection, p. 4.



inasmuch as the Receiver would object to the Claimants having any claim whatsoever if their ABIs are held to be valid.<sup>15</sup>

**IV.**

**CONCLUSION**

For the reasons stated herein, the Receiver requests that the Court (a) overrule the Claimants' Objection and grant the Claims Disallowance Motion as to POC 1320, POC 1321 and POC 1401, thus disallowing these Proofs of Claim in their entirety, and (b) order that POC 1402 be allowed in the reduced amount of \$433,453.35.

DATED this 6th day of May, 2016.

**DORSEY & WHITNEY LLP**

*/s/ Peggy Hunt*

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Peggy Hunt

John J. Wiest

*Attorneys for Receiver*

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<sup>15</sup> It should be noted that Shah has filed a lawsuit against a third party to recover losses related to her National Note investment. If POC 1401 is allowed, any recovery she obtains in that lawsuit should reduce the amount of the claim asserted in this case.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of May, 2016, the foregoing **RECEIVER'S REPLY TO LISA SANDERS SHAH'S, KRISTINE OLSON'S, AND THE KRISTINE OLSON PROFIT SHARING PLAN'S RESPONSE TO THE RECEIVER'S MOTION REQUESTING DISALLOWANCE OF PROOFS OF CLAIM** was filed with the Court and served via ECF on all parties who have requested notice in this case.

/s/ John J. Wiest

I hereby certify that on the 6thth day of May, 2016, a true and correct copy of the foregoing **RECEIVER'S REPLY TO LISA SANDERS SHAH'S, KRISTINE OLSON'S, AND THE KRISTINE OLSON PROFIT SHARING PLAN'S RESPONSE TO THE RECEIVER'S MOTION REQUESTING DISALLOWANCE OF PROOFS OF CLAIM** was served upon the person named below, at the address set out below by U.S. mail:

Wayne L. Palmer  
8816 South 2240 West  
West Jordan, UT 84088

/s/ Suanna Armitage

I further hereby certify that on the 6th day of May, 2016, a true and correct copy of the foregoing **RECEIVER'S REPLY TO LISA SANDERS SHAH'S, KRISTINE OLSON'S, AND THE KRISTINE OLSON PROFIT SHARING PLAN'S RESPONSE TO THE RECEIVER'S MOTION REQUESTING DISALLOWANCE OF PROOFS OF CLAIM** was served upon the person named below, at the email address noted:

Paul B. Barton  
Counsel for the Claimants  
paul@zupgroup.com

/s/ John J. Wiest