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Attorney for John H. Krommenhoek, Chapter 7 Trustee

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE:	)	Case No. 93-02385JDP
	)	Chapter 7
DAVID SILVA and SHARON SELMASSKA,	)	
	)	NOTICE OF HEARING AND MOTION
	)	TO APPROVE COMPROMISE
Debtors.	)	WITH FIRST UNION NATIONAL
	)	BANK

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COMES NOW First Union National Bank, formerly known as First Fidelity Bank, N.A., formerly known as First Fidelity Bank, N.A., New Jersey ("First Union"), by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP, and the Chapter 7 Trustee John H. Krommenhoek, by and through its counsel of record Barry Peters, in accordance with Federal Rules of Bankruptcy Procedure 9019(a) and moves this Court for an Order Approving Compromise as to the Default Judgment entered by this Court on August 17, 1995, based upon the following grounds:

1. On July 14, 1995, the Trustee filed an Adversary Complaint entitled Complaint For Turnover in Case No. 95-6117, against First Fidelity Bank, N.A., New Jersey.

2. On August 17, 1995, this Court entered a Default Judgment in that adversary proceeding and awarded the Trustee the sum of $45,330.70, together with interest at the statutory rate under Section 28-2-104 of the Idaho Code from August 13, 1993, in the approximate amount of $10,879.37; plus costs in the sum of $120.00 and interest from the date of judgment at the rate provided by Section 28-22-1094 of the Idaho Code. The state interest rate at that time was 10.875% per annum.

3. First Union filed a motion pursuant to Fed. R. Civ. P. 60(b)(4) and Bankruptcy Rule 9024 to set aside the Default Judgment for lack of subject matter jurisdiction. On October 14, 1997, the Bankruptcy Court denied First Union's motion.

4. On October 23, 1997, First Union appealed the Bankruptcy Court's decision and on September 16, 1998, the Honorable Edward J. Lodge, District Judge for the United States District Court for the District of Idaho, entered an order affirming the Bankruptcy Court's denial of First Union's motion.

5. First Union appealed from the District Court's order to the Ninth Circuit Court of Appeals and on July 28, 1999, the Ninth Circuit Court of Appeals affirmed the District Court's order.

6. First Union was considering filing a Petition for Certiorari to the United States Supreme Court notwithstanding the affirmance of the District Court's order and First Union's belief that the Default Judgment was entered based upon lack of subject matter jurisdiction.

7. First Union also contends that the Default Judgment was incorrectly entered at the state interest rate of 10.875% and should instead have been entered at the federal compound interest rate of 5.7%. First Union contends that the incorrect interest rate creates an error in interest in the sum of $10,737.29.

8. First Union contends that the Default Judgment should be modified to revise the Default Judgment to only allow the federal interest rate to apply rather than the state interest rate, pursuant to Fed. R. Civ. P. 60(a). First Union contends that pursuant to *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987), the law in the Ninth Circuit is that a court may invoke Rule 60(a) in order to make the judgment reflect the actual intentions of

the Court, plus the necessary implications. Errors correctable under Rule 60(a) include those circumstances where what is written or recorded is not what the Court intended to write or record. It is First Union's position that it is implausible that the Honorable Judge Pappas misconstrued the law to intend that the state interest rate applied rather than the federal interest rate. It appears that it was merely an inadvertent mistake by the Trustee when the Trustee submitted the Default Judgment to the Court's attention for execution.

9. The Trustee is of the opinion, based upon the cases and authorities cited in Section 176 of 46 *Am Jur 2d*, "Judgments", that any effort by First Union to modify the Judgment under Rule 60(a) would fail.

10. In consideration of First Union's willingness to immediately pay the compromise amount to the Trustee pursuant to terms set forth in the Release and Settlement Agreement and its relinquishment of its right to file a Petition for Certiorari in the United States Supreme Court and/or to file a Motion to Modify Default Judgment to attempt to correct the interest rate pursuant to Fed. R. Civ. P. 60(a), the Trustee and First Union have reached an agreement whereby the Trustee will discount the amount owed under the Default Judgment that applied the Idaho state interest rate, by $5,368.65 and will, therefore, accept the amount of $75,642.72 as full and final payment for the Default Judgment.

WHEREFORE, First Union and the Trustee respectfully request that this Court approve the compromise with First Union National Bank.

NOTICE OF HEARING

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that First Union Bank and the Trustee will call up for hearing their Motion for Compromise With First Union National Bank (F.B.R. 9019(a)) on the 10th day of November, 1999, at 9:30 a.m., or as soon thereafter as counsel may be heard in the United States Federal Building, 550 West Fort Street, 5th Floor, Boise, Idaho 83724.

DATED THIS 7th day of October, 1999.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Sheila R. Schwager
Attorneys for First Union National Bank

By _____
Barry Peters
Attorney for John H. Krommenhoek,
Chapter 7 Trustee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of ~~September, 1999~~ October 98, I caused to be served a true copy of the foregoing NOTICE OF HEARING AND MOTION TO APPROVE COMPROMISE WITH FIRST UNION NATIONAL BANK, by the method indicated below, and addressed to each of the following:

Barry Peters Attorney at Law 101 Eagle Glen Lane, Suite A Eagle, Idaho 83616	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Office of the U. S. Trustee P.O. Box 110 Boise, Idaho 83701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Laura E. Burri RINGERT CLARK CHARTERED P.O. Box 2773 Boise, Idaho 83701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
John H. Krommenhoek P.O. Box 8358 Boise, Idaho 83707	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Mountain West Audio 1920 W. Alexander St. Salt Lake City, Utah 84119	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Richard Zane c.o Harold Q. Noack, Jr. P.O. Box 875 Boise, Idaho 83701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
United States Automobile Association 1855 Telstar Drive Colorado Springs, Colorado 80920	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy

Back Stage Comedy Network The Entertainer Agency 501 E. Monte Vista, Suite A Vacaville, California 95688	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
PMI Mortgage Insurance Co. 601 Montgomery St. San Francisco, California 94111	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Internal Revenue Service 550 W. Fort Street Boise, Idaho 83724	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
TCI Cable Szabo Associates, Inc. 3355 Lenox Road, 9th Floor Atlanta, Georgia 30326	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
KIVI Television Charis Sallee 1866 E. Chisholm Dr. Nampa, Idaho 83687	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Darrell Jensen c/O Jeffrey M. Wilson P.O. Box 1544 Boise, Idaho 83701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy
Barbara J. Wussler c/o Moffatt Thomas P.O. Box 829 Boise, Idaho 83701	X U.S. Mail, Postage Prepaid __ Hand Delivered __ Overnight Mail __ Telecopy

Sheila R. Schwager

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