

Ron Kerl, Esq. (ISB #1768)
Gary L. Cooper, Esq. (ISB # 1814)
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Suite 210
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com
Email: gary@cooper-larsen.com

Attorneys for Tim Gray Smith

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

In the Matter of:

TIM GRAY SMITH,

Debtor.

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)
)
)
)
)
)

CASE NO. 16-40578-JDP

**JOINT MOTION TO APPROVE COMPROMISE
AND NOTICE OF OPPORTUNITY TO OBJECT**

No objection. The Court may consider this request for an order without further notice of hearing unless a party in interest files an objection within twenty-one [21] days of the date of this notice.

If an objection is not filed within the time permitted, the court may consider that there is no opposition to the granting of the requested relief and may grant the relief without further notice or hearing.

Objection. Any objection shall set out the legal and/or factual basis for the objection. A copy of the objection shall be served on the movant.

Hearing on Objection. The objecting party shall also contact the court's calendar clerk to schedule a hearing on the objection and file a separate notice of hearing.

Pursuant to Federal Rule of Bankruptcy Procedure 9010, the Debtor Tim Gray Smith (“Debtor”) and Community Care, PLLC, an Idaho limited liability Company (“Community Care”), jointly move the Court for approval of a compromise reached between the Debtor and Community Care. In support of this joint motion, the Debtor and Community Care represent the following to the Court:

FACTUAL BACKGROUND

1. On June 29, 2016 (the “Petition Date”) the Debtor filed a voluntary petition for Chapter 7 bankruptcy relief.

2. Prior to the Petition Date, Community Care filed a civil complaint against the Debtor and others in the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, Case No. CV-2012-4603-OC (the “State Court Litigation”). The filing of Debtor’s Chapter 7 petition invoked the automatic stay under 11 U.S.C. §362 and prevented the further prosecution of the claims asserted against the Debtor in the State Court Litigation.

3. On September 22, 2016, Community Care filed a motion for relief from the automatic stay seeking, among other relief, the right to continue the State Court Litigation (Dkt. 30) (the “Stay Relief Motion”). Debtor opposed and objected to the Stay Relief Motion.

4. On September 23, 2016, Community Care filed an Adversary Complaint (Dkt. 37) against the Debtor (Adversary Proceeding No. 16-08028) seeking an order determining that some of its claims against the Debtor were not dischargeable under 11 U.S.C. §523(a)(2) (the “Non-dischargeability Litigation”). Debtor opposed and has defended the Non-dischargeability Litigation.

5. On October 19, 2016, the order discharging the debtor was executed by the Court.

6. On January 20, 2017, Community Care amended its Stay Relief Motion and filed a Motion for Abstention (Dkt. 56) (the “Amended Stay Relief Motion”). Debtor opposed and objected to the Amended Stay Relief Motion.

7. On February 22, 2017, the Court granted the Amended Motion (Dkt. 64), as a result of which the Debtor and Community Care resumed the State Court Litigation.

8. A trial of the State Court Litigation was scheduled to commence on October 23, 2017.

9. On October 14, 2017, the Debtor and Community Care agreed to settle all of the claims set forth in both the State Court Litigation and the Non-dischargeability Litigation.

TERMS OF PROPOSED COMPROMISE

Debtor and Community Care have agreed that upon Debtor’s payment of \$100,000.00 to Community Care the parties will resolve all of the claims set forth in the State Court Litigation and all of the claims set forth in the Non-dischargeability Litigation without the need to further litigate the issues raised in the State Court Litigation and without the need to seek and oppose this Court’s grant of full faith and credit to any factual findings rendered in the State Court Litigation in the further prosecution of the Non-dischargeability Litigation, as well as continuing the prosecution and defense of the Non-dischargeability Litigation. The parties have reduced their settlement agreement to a writing, a true and accurate copy of which is attached hereto as Exhibit “A” (the “Settlement Agreement”).

ANALYSIS OF THE COMPROMISE

Debtor and Community Care believe and urge the Court to find that the proposed compromise is fair and reasonable and satisfies the test established in *In Re A & C Properties*, 784 F.2d 1377 (9th Cir. 1986).

1. Probability of success in the State Court Litigation. The claims set forth in the State Court Litigation were complex and the facts supporting the claims were hotly contested by both parties. The alleged conduct occurred between 2004 and 2011 requiring witnesses to recall events that took place more than a decade ago. Critical records of Board Meetings over a seven year period were missing and believed to have been intentionally destroyed by another defendant, Ryan Peterson. The claims included intentional misrepresentation, which requires proving nine separate elements by clear and convincing evidence. The trial also included an allegation of conspiracy that requires specific evidence of an agreement between tortfeasors. Debtor anticipated that at least two witnesses were going to offer testimony that may have contradicted statements in prior sworn affidavits.

2. Probability of success in the Non-dischargeability Litigation. It is not clear that the legal and factual issues relevant in the Non-dischargeability Litigation, e.g., false pretenses, false representation, and actual fraud, would have been adequately addressed in the final decision rendered in the State Court Litigation so as to not require the parties to have to re-litigate those factual questions and legal issues before this Court in the Non-dischargeability Litigation. It is possible that the matter would have to be tried a second time in bankruptcy as there are key differences between the requirements in the state law claims and requirements to prove that a claim is not dischargeable.

3. Difficulties, if any, to be encountered in the matter of collection. Assuming that the successful prosecution of Community Care's claims in the State Court Action would result in a final judgment of this Court that those claims constitute false pretenses, false representation, and actual fraud and are therefore not discharged by the Bankruptcy Code, there is uncertainty in the Debtor's ability to respond to the damage claims in any meaningful way. Any attempt to enforce a judgment against the Debtor would no doubt require significant and expensive post-judgment proceedings to

find unencumbered and non-exempt property to execute upon, and the likelihood of such unencumbered and non-exempt assets having a value in excess of the amount offered in settlement is unlikely. At least unlikely in the short term. Collection efforts on the part of Community Care would likely take years and at a substantial cost.

4. The complexity, inconvenience and/or delay. As demonstrated to the Court in the proceedings related to the Amended Motion for Stay Relief, claims of false pretenses, false representation, and actual fraud were hotly contested by the parties and were complex. The parties disclosed over 250 exhibits that were to be offered into evidence in the trial of the State Court Litigation. The parties disclosed approximately 54 witnesses who were expected to testify at the trial of the State Court Litigation. The parties expected that the trial would occur over 10 trial days.

Depending upon the outcome of Community Care's claims in the State Court Litigation, one or the other of the parties would then seek this Court's grant of full faith and credit to the state court's determinations in the State Court Litigation in order to prosecute or defend the Non-dischargeability Litigation. If unsuccessful in that regard, there would be further litigation in this Court relating to issue preclusion, collateral estoppel and res judicata. Depending upon the rulings on those matters, the parties may be left with re-litigation for the claims of false pretenses, false representation, and actual fraud.

The complexity of the factual and legal issues justify both parties' compromise and settlement. The cost savings to both parties, derived from stopping active and contested litigation, is significant. Community Care and debtor have incurred substantial sums in fees and costs in prosecuting and defending the state court and bankruptcy proceedings.

The conclusion through trial of the State Court Litigation would not conclude the Non-

dischargeability Litigation. Nor would a final decision by the trial courts in either case assure the parties that appeals may not be taken.

The proposed compromise brings an end to the litigation in two courts, brings to an end the cost of prosecuting and defending these claims in two different venues, assures Community Care of a timely recovery, and provides Tim Smith with a certain end to the litigation so that he can take advantage of the fresh start offered to him by Chapter 7 of the Bankruptcy Code.

5. The interests of creditors. The proposed compromise has no effect upon the Bankruptcy Estate or the Debtor's creditors whose claims have been discharged by operation of law. The funds from which the Settlement Payment will be made are proceeds from an unsecured post-petition loan to the Debtor. No Estate property is affected by the compromise. No pre-petition claims, other than those of Community Care, are affected by the proposed compromise.

WHEREFORE, the Debtor and Community Care recommend approval of the settlement and request the Court to grant the parties Motion to Approve Compromise in order to bring to an end the State Court Litigation and the Non-dischargeability Litigation. Debtor and Community Care urge the Court to find that the proposed compromise is fair and reasonable and satisfies the test established in *In Re A & C Properties*.

COOPER & LARSEN, CHTD.

Attorneys for Tim Gray Smith

By: /s/Ron Kerl
Ron Kerl, Esq.

Dated: October 19, 2017

EVANS KEANE, LLP

Attorneys for Community Care, PLLC

By: /s/ Jed W. Manwaring
Jed W. Manwaring

Dated: October 19, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 19th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Stephen Kent Madsen
skmadsen.mayneslaw@gmail.com

Robert J. Maynes
mayneslaw@hotmail.com

Mary P. Kimmel
ustp.region18.bs.ecf@usdoj.gov

US Trustee
ustp.region18.bs.ecf@usdoj.gov

Jed W. Manwaring
jmanwaring@evanskeane.com

Gary L. Cooper
gary@cooper-larsen.com

Thomas Daniel Smith
tsmith8206@cableone.net

Kimbell D. Gourley
kgourley@idalaw.com

AND, I HEREBY CERTIFY that I have mailed by United States Postal Service the foregoing document(s) to the following non-CM/ECF Registered Participant(s):

Those listed on the attached mailing matrix.

By: /s/ Ron Kerl
Ron Kerl

Label Matrix for local noticing
0976-4
Case 16-40578-JDP
District of Idaho
Pocatello
Wed Oct 18 11:22:29 MDT 2017

American Express
PO Box 981535
El Paso, TX 79998-1535

Beard St. Clair Gaffney
2105 Coronado St.
Idaho Falls, ID 83404-7495

Bryan Ruth Hammar
3902 E. 132 N.
Rigby, ID 83442-5891

Card Member Services
P.O. Box 94014
Palatine, IL 60094-4014

Clay & Darce Prince
625 Harvest Dr.
Rexburg, ID 83440-2282

Community Care Pref.
Patient Card Network, LLC
2725 Channing Way
Idaho Falls, ID 83404-7510

~~Community Care, PLLC~~
~~2725 Channing Way~~
~~Idaho Falls, ID 83404-7510~~

~~Cooper & Larsen~~
~~P.O. Box 4229~~
~~Pocatello, ID 83205-4229~~

Dart Adamson Donovan
257 E. 200 S. #1050
Salt Lake City, UT 84111-2053

ARSI
American Recovery Service Inc
Corporate Headquarters
555 St Charles Dr, Ste 100
Thousand Oaks CA 91360-3983

American Express Bank FSB
c/o Becket and Lee LLP
PO Box 3001
Malvern PA 19355-0701

Brad Elaine Speakman
343 S. Teton Ave
Sugar City, ID 83448-1133

Bryant L. Fenske
3666 E. 157 N.
Rigby, ID 83442-5671

Channing Med. Leasing, LLC
2725 Channing Way
Idaho Falls, ID 83404-7510

Community Care Holdings, LLC
2725 Channing Way
Idaho Falls, ID 83404-7510

~~Community Care Rexburg Leas.~~
~~2725 Channing Way~~
~~Idaho Falls, ID 83404-7510~~

~~Gary L Cooper~~
~~POB 4229~~
~~Pocatello, ID 83205-4229~~

~~Craig A. Hoggan, Esq.~~
~~Dart, Adamson Donovan~~
~~257 E. 200 S., Ste 1050~~
~~Salt Lake City, UT 84111-2053~~

David Kari Daniels
601 Autumn Court
Rexburg, ID 83440-2291

American Express
P.O. Box 0001
Los Angeles, CA 90096-8000

Autumnwood Storage
3855 E. 285 N.
Rigby, ID 83442

Brumfield Medical Serv., P.C
356 LaCosta Drive
Idaho Falls, ID 83401-5651

Capital One Bank
P.O. Box 60599
City of Industry, CA 91716-0599

Chase
P.O. Box 15123
Wilmington, DE 19850-5123

Community Care Leasing, LLC
2725 Channing Way
Idaho Falls, ID 83404-7510

Community Care Rigby Leasing
2725 Channing Way
Idaho Falls, ID 83404-7510

~~Cooper Larsen, Chartered~~
~~Attorneys at Law~~
~~151 N. 3rd Ave., Fl. 2~~
~~Pocatello, ID 83201-6331~~

~~Craig G. Adamson, Esq.~~
~~Dart, Adamson Donovan~~
~~257 E. 200 S., Ste 1050~~
~~Salt Lake City, UT 84111-2053~~

Derek & Marshae Campbell
311 E 65th N
Idaho Falls, ID 83401-5690

Discover Personal Loans
P.O. Box 6105
Carol Stream, IL 60197-6105

Discover Personal Loans
PO Box 30954
Salt Lake City, UT 84130-0954

Dr. Jeff Zollinger
Rexburg Medical Center
393 E 2nd N
Rexburg, ID 83440-1605

East Idaho Medical Center
P.O. Box 290429
Nashville, TN 37229-0429

Eastern Idaho Health Serv
00310
P.O. Box 740757
Cincinnati, OH 45274-0757

Eastern Idaho Healthcare Sys
3580 S. 5500 W.
Rexburg, ID 83440-4949

Gary L. Cooper
Cooper & Larsen
151 North Third Avenue, Second Floor
P. O. Box 4229
Pocatello, ID 83205-4229

Kimbell D Gourley
POB 1097
Boise, ID 83701-1097

Hometown Healthcare, LLC
655 Harvest Drive
Rexburg, ID 83440-2282

R Sam Hopkins
POB 3014
Pocatello, ID 83206-3014

(p)IDAHO CENTRAL CREDIT UNION
PO BOX 2469
POCATELLO ID 83206-2469

Idaho State Tax Commission
P.O. Box 36
Boise, ID 83722-0036

Internal Revenue Service
Kansas City, MO 64999-0149

Internal Revenue Service
P.O. Box 7346
Philadelphia, PA 19101-7346

James Melissa Maguire
3580 S. 5500 W.
Rexburg, ID 83440-4949

Jeffrey D. Brunson, Esq.
520 First American Circle
Rexburg, ID 83440-5400

Joe Mie Anderson
4126 S. 45th E.
Idaho Falls, ID 83406-5120

Joe Stieglitz
5185 East Redonna Circle
Idaho Falls, ID 83406-8229

Joelle S. Kelser, Esq.
Dart Adamson Donovan
257 E. 200 S. #1050
Salt Lake City, UT 84111-2053

Mary P Kimmel
OFFICE OF THE US TRUSTEE US DEPT
720 Park Blvd., Ste. 220
Boise, ID 83712-7785

Kristen Smith
231 N. 3800 E.
Rigby, ID 83442-5458

Stephen Kent Madsen
Maynes Taggart PLLC
PO Box 3005
Idaho Falls, ID 83403-3005

Jed W Manwaring
PO Box 959
1161 West River Street, Suite 100
Boise, ID 83702-7054

Robert J Maynes
Maynes Taggart, PLLC
POB 3005
Idaho Falls, ID 83403-3005

Mountain View Hospital
2325 Coronado St.
Idaho Falls, ID 83404-7407

Nathan J. Kopp, Esq.
Dart Adamson Donovan
257 E. 200 S., Ste. 1050
Salt Lake City, UT 84111-2053

Packer Emergency Med Serv
1919 Warm Springs Rd
Idaho Falls, ID 83402-4791

Rigby Family Medical Centr
3902 E. 132 N.
Rigby, ID 83442-5891

Rocky Mtn. Medicine, PLLC
c/o David Daniels
601 Autumn Court
Rexburg, ID 83440-2291

Ryan Peterson
15945 Mullan Road
Missoula, MT 59808-9417

Scenic Falls Credit Union
1530 Elk Creek Drive
Idaho Falls, ID 83404-8322

Scott M. Packer, MD
1919 Warm Springs Rd
Idaho Falls, ID 83402-4791

Thomas Daniel Smith
Service & Spinner
P.O. Box 6009
Pocatello, ID 83205-6009

Tim Gray Smith
212 N 3785 E
Rigby, ID 83442-5424

Smith Wilson Financial Ser
212 N. 3785 E.
Rigby, ID 83442-5424

Smith Wilson, SVCS
1820 E. 17th St. #135
Idaho Falls, ID 83404-6403

Smith Consulting, Inc.
212 N. 3785 E.
Rigby, ID 83442-5424

Tier II Enterprises, PLLC
311 E 65th N
Idaho Falls, ID 83401-5690

Troy Amy Brumfield
356 LaCosta Drive
Idaho Falls, ID 83401-5651

US Trustee
Washington Group Central Plaza
720 Park Blvd, Ste 220
Boise, ID 83712-7785

Verizon
P.O. Box 660108
Dallas, TX 75266-0108

WELLS FARGO BANK, N.A.
REAFFIRMATION GROUP
MAC# D0203-023
1100 Corporate Center Drive
Raleigh, NC 27607-5066

Wells Fargo
Educational Fin. Serv.
P.O. Box 5185
Sioux Falls, SD 57117-5185

Wells Fargo
P.O. Box 10335
Des Moines, IA 50306-0335

Wells Fargo
P.O. Box 51120
Los Angeles, CA 90051-5420

Wells Fargo Bank N A
Wells Fargo Education Financial Services
301 E 58th Street N
Sioux Falls SD 57104-0422

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

Idaho Central Credit Union
c/o NDunker
POB 2469
Pocatello, ID 83206

(d)Idaho Central Credit Union
PO Box 2469
Pocatello, ID 83206

The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

(u)Community Care PLLC

End of Label Matrix
Mailable recipients 75
Bypassed recipients 1
Total 76

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

COMMUNITY CARE, PLLC, an Idaho Limited Liability Company (“COMMUNITY CARE”), for the consideration of One Hundred Thousand Dollars (\$100,000), to be paid within thirty (30) days of the date of execution of this Agreement, and the conditions and terms set forth herein does hereby release, acknowledge and promise to TIM SMITH, together with his agents, attorneys, successors, assigns, heirs and employees, including, but not limited to, Smith & Wilson Financial Services, LLC and Smith Consulting, Inc. collectively referred to herein as “SMITH” as follows:

1. RELEASE OF ALL CLAIMS AND DISCHARGE OF LIABILITY

AGAINST SMITH. COMMUNITY CARE, on its own behalf and on behalf of its members, employees, officers, managers, administrators, successors and assigns, including but not limited to Community Care Holding, PLLC, Community Care Leasing, PLLC, Community Care Investments, LLC, Community Care Preferred Patient Card Network, LLC hereby releases and forever discharges SMITH from all claims, causes of action, (including, but not limited to, all causes of action based upon direct, indirect, actual, implied, and/or implied agency with or in connection with Smith Consulting, Inc. and Smith & Wilson Financial Services, LLC, an Idaho Limited Liability Company), damage and expenses whatsoever, whether known or unknown, which COMMUNITY CARE has had, now has, or may hereafter have as a result of any and all accountant representation, advice, work or consults and/or implied or express contract work rendered or given to COMMUNITY CARE from the beginning of time to the date this Settlement Agreement and Release and Indemnification Agreement is signed.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

PAGE 1

2. RELEASE OF ALL CLAIMS AND DISCHARGE OF LIABILITY AGAINST COMMUNITY CARE. SMITH hereby releases and forever discharges COMMUNITY CARE from all claims, causes of action, damage and expenses whatsoever, whether known or unknown, which SMITH has had, now has, or may hereafter have as a result of any and all conduct by COMMUNITY CARE from the beginning of time to the date this Settlement Agreement and Release and Indemnification Agreement is signed.

3. REDUCTION OF CLAIM, INDEMNIFICATION AND HOLD HARMLESS PROVISIONS. COMMUNITY CARE AND SMITH expressly acknowledges that COMMUNITY CARE also contends that its alleged damages were caused, in whole or in part, by the conduct of Ryan Peterson. In the event it is so determined by any court of competent jurisdiction that Ryan Peterson or any other alleged tortfeasor are or were jointly and severally liable for COMMUNITY CARE's alleged damages, then this Agreement shall not in any manner release or extinguish the claims of COMMUNITY CARE against Ryan Peterson But it shall release all claims against SMITH to the extent necessary to protect SMITH from any further liability for the damages which COMMUNITY CARE claims it suffered because of the conduct of SMITH

4. SATISFACTION OF JUDGMENT. COMMUNITY CARE agrees to release and satisfy that part of any judgment in favor of COMMUNITY CARE against Ryan Peterson to

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

PAGE 2

the extent Ryan Peterson obtains a judgment for contribution, indemnification, subrogation or similar claim against SMITH, whether by third-party action, cross-claim, independent action, or on any other basis. The satisfaction of said judgment shall, as necessary, be accomplished by a reduction of COMMUNITY CARE's judgment against Ryan Peterson to the extent necessary to protect SMITH from such claims.

5. ATTORNEY FEES. In the event it shall become necessary to enforce the provisions of this Agreement, the prevailing party shall be entitled to attorney fees and all costs incurred in enforcing the terms of this Agreement.

6. ACKNOWLEDGMENTS. COMMUNITY CARE AND SMITH acknowledge and represent as follows:

- A. The settlement memorialized in this Agreement is a complete compromise of disputed claims between COMMUNITY CARE and SMITH;
- B. COMMUNITY CARE agrees to dismiss its Complaint against Tim Smith and Smith & Wilson Financial Services, LLC In the Seventh Judicial District Court in and for Bonneville County, State of Idaho, Case #CV-2012-4603 with prejudice;
- C. COMMUNITY CARE agrees that it will not pursue its Complaint against SMITH For Denial of Dischargeability of Debt Pursuant to 11 U.S.C. Section 523(a)(2) and (a)(6) in The United States Bankruptcy Court District of Idaho, Case #16-08028-JDP and will stipulate to the dismissal of its Complaint with prejudice;
- D. COMMUNITY CARE has expended substantial resources in pursuing this matter and the matters pending in bankruptcy court and after investigating the circumstances, believes that it would expend more resources pursuing these matters through trial and subsequent proceedings than it could reasonably hope to recover at the conclusion of these matters;

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

- E. COMMUNITY CARE agrees that the settlement memorialized in this Agreement includes any liability that TIM SMITH might or could have as agents, employees, officers, managers, members, shareholders or contractors for or with Smith & Wilson Financial Services, LLC or Smith Consulting, Inc. or other entity with which Tim Smith was associated at any time;
- F. COMMUNITY CARE agrees that the settlement memorialized in this Agreement includes any liability of Smith & Wilson Financial Services, LLC to COMMUNITY CARE and COMMUNITY AGREE agrees that it will not take further action to obtain a money judgment against Smith & Wilson Financial Services, LLC which shall also be dismissed with prejudice from the pending litigation;
- G. Both parties have been represented by counsel of their choice and have had ample opportunity to read, study and make inquiry about the terms contained herein and the legal effect of the said terms of this Agreement and are, therefore, relying on their own respective informed judgment about the advisability of entering into this Agreement;
- H. The person signing this Agreement for COMMUNITY CARE has the full and unqualified authority to execute this Agreement and bind Community Care, PLLC; Community Care Holding, PLLC; Community Care Leasing, PLLC; Community Care Investments, LLC; Community Care Preferred Patient Card Network, LLC; Community Care Rexburg Leasing, LLC; Community Care Pocatello, LLC and its/their members, employees, officers, managers, administrators, successors and assigns; and
- I. Neither party is relying on any statement of the other party except to the extent either party has made a statement or representation which is contained in this Agreement.

7. APOLOGY AND CONFIDENTIALITY. TIM SMITH represents that he is entering into this Agreement because he recognizes the members of COMMUNITY CARE view some of TIM SMITH's interactions with COMMUNITY CARE were inappropriate. He sincerely apologizes to each and every member of COMMUNITY CARE who believes that his actions and conduct breached the trust and confidence they placed in him. He feels remorse and

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

apologizes for the harm that COMMUNITY CARE believes was caused by his conduct.

Notwithstanding the foregoing, COMMUNITY CARE and SMITH acknowledge and understand that the settlement memorialized in this Settlement Agreement and Release and Indemnification Agreement, including this apology, is to be strictly confidential. Except for a limited disclosure to the Courts to obtain the “with prejudice” dismissals contemplated by this Agreement, COMMUNITY CARE and SMITH and their agents, attorneys, successors, assigns, heirs and employees agree to keep the terms, conditions, details and the consideration for this Agreement confidential and shall not disclose the same to third parties. Notwithstanding the foregoing, COMMUNITY CARE and SMITH shall have the right to disclose the terms, conditions, details and the consideration for this Agreement to their accountants and tax preparers, but any such person to whom the terms are disclosed shall be notified and be bound by the terms of this confidentiality provision. COMMUNITY CARE shall have the right to disclose the terms, conditions, details and the consideration for this Agreement to their insurers, but only to the limited extent necessary for the conduct of insurance business. COMMUNITY CARE and SMITH shall have the right to disclose the terms, conditions, details and consideration for this agreement pursuant to a valid court order or subpoena, but the party which receives a court order or subpoena shall immediately notify the other party so that the other party has sufficient opportunity to object. Notwithstanding the foregoing, COMMUNITY CARE and SMITH shall have the right to disclose the terms, conditions, details and the consideration for this Agreement to the IRS for the limited extent necessary for filing tax returns. Notwithstanding the foregoing, COMMUNITY CARE and SMITH shall have the right to disclose the terms, conditions, details

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

PAGE 5

and the consideration for this Agreement to its shareholders, members or others within their business entities to the extent necessary for obtaining authorization to execute this Agreement, but any person to whom the terms are disclosed shall be notified and be bound by the terms of this Confidentiality provision. Any other disclosure by COMMUNITY CARE and SMITH, or their attorneys, shall occur only with the written consent of the other party.

8. CONTROLLING LAW. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho.

9. INTEGRATION. This Agreement constitutes the entire Agreement between the parties. This Agreement may be amended or modified only by signed written agreement.

DATED the _____ day of OCTOBER, 2017.

COMMUNITY CARE, PLLC
PRINTED NAME:
ITS AUTHORIZED MANAGER/MEMBER

APPROVED AS TO FORM:

DART, ADAMSON & DONAVAN
By:

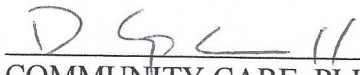
DATED the _____ day of OCTOBER, 2017.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

SMITH shall have the right to disclose the terms, conditions, details and consideration for this agreement pursuant to a valid court order or subpoena, but the party which receives a court order or subpoena shall immediately notify the other party so that the other party has sufficient opportunity to object. Notwithstanding the foregoing, COMMUNITY CARE and SMITH shall have the right to disclose the terms, conditions, details and the consideration for this Agreement to the IRS for the limited extent necessary for filing tax returns. Notwithstanding the foregoing, COMMUNITY CARE and SMITH shall have the right to disclose the terms, conditions, details and the consideration for this Agreement to its shareholders, members or others within their business entities to the extent necessary for obtaining authorization to execute this Agreement, but any person to whom the terms are disclosed shall be notified and be bound by the terms of this Confidentiality provision. Any other disclosure by COMMUNITY CARE and SMITH, or their attorneys, shall occur only with the written consent of the other party.

8. **CONTROLLING LAW.** This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho.
9. **INTEGRATION.** This Agreement constitutes the entire Agreement between the parties. This Agreement may be amended or modified only by signed written agreement.

DATED the 14 day of OCTOBER, 2017.



COMMUNITY CARE, PLLC
PRINTED NAME:
Derek Campbell

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

PAGE

TIM SMITH

APPROVED AS TO FORM:

COOPER & LARSEN
By: GARY L. COOPER

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

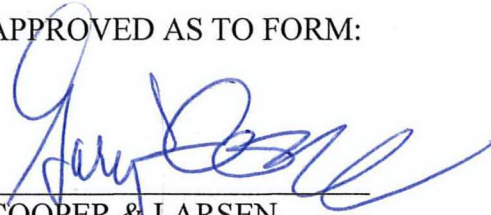
PAGE 7

DATED the 14 day of OCTOBER, 2017.



TIM SMITH

APPROVED AS TO FORM:



COOPER & LARSEN
By: GARY L. COOPER

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

PAGE 7