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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

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

Defendants.

**RECEIVER'S SEVENTH MOTION AND
MEMORANDUM IN SUPPORT
REQUESTING ORDER APPROVING
SETTLEMENT AGREEMENTS**

**(Dale Himmer; Dan Ainsworth; 106th
Southtowne Hotel Management, L.C.;
Charles W. Elliott; Carla Whitehouse;
Ashley Nielsen; and the Estate of Leo Pavich)**

2:12-cv-00591 BSJ

The Honorable Bruce S. Jenkins

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 and pursuant to the *Order Appointing Receiver and Staying Litigation* entered by this Court in this case, respectfully requests that the Court enter the proposed Order attached hereto as **Exhibit A**, approving the below-described Settlement Agreements and Releases entered into by the Receiver. This Motion is supported by the *Memorandum of Law* contained herein and the *Declaration of R. Wayne Klein, Receiver* filed concurrently herewith (the "Receiver

Declaration”).

MEMORANDUM OF SUPPORT

I.

BACKGROUND

1. On June 25, 2011, the above-captioned case was commenced by the Securities and Exchange Commission (the “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”).¹ Pursuant to the Receivership Order, the Receiver was appointed, and NNU, and forty-one of its affiliated companies (the “Palmer Entities” and collectively with NNU for purposes of this Motion, “NNU”), and all Palmer’s assets were placed in the Receiver’s control.²

2. The Court has directed and authorized the Receiver to, among other things, do the following:

- “[D]etermine the nature, location and value of all property interests of the Receivership Defendants and the Palmer Entities . . . [.]”³
- “To take custody, control and possession of all Receivership Property and records . . . [.]”⁴
- “To manage, control, operate and maintain the Receivership Estates and hold in his possession, custody and control all Receivership Property, pending further Order of this Court[.]”⁵

¹ Docket No. 9 (Receivership Order).

² *See generally, id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

⁵ *Id.* at ¶ 7(C).

- “To use Receivership Property for the benefit of the Receivership Estates, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his duties as Receiver[.]”⁶
- “[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.”⁷
- “To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates[.]”⁸

II.

THE SETTLEMENT AGREEMENTS AND RELEASES

3. As a result of his financial analysis and investigation of the Receivership Defendants conducted to date, the Receiver has determined that he has claims and causes of action against numerous parties related to these parties’ dealings with the Receivership Defendants prior to his appointment.⁹

4. Prior to commencing suit, the Receiver made demand on numerous parties for the return of monies paid to them by the Receivership Defendants. Based on demand made and lawsuits filed, the Receiver has entered into seven Settlement Agreements and Releases with certain parties.¹⁰ Each of these Settlement Agreements (a) has been negotiated at arm’s length and in good faith by the Receiver and the respective parties, (b) will avoid the expense, delay and inherent risks of litigation, (c) will result in either the collection of funds for the benefit of the

⁶ *Id.* at ¶ 7(D).

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 7(J).

⁹ Receiver Declaration ¶ 3.

¹⁰ Receiver Declaration ¶ 4.

Receivership Estate or reduction of claims and/or defenses that can be asserted against the Receivership Estate, and (d) where applicable, has taken into account issues related to the collection of any judgment that may be obtained.¹¹

5. The Settlement Agreements subject to the present Motion, all of which are subject to Court approval, are as follows:

a. Himmer: On June 21, 2013, the Receiver filed suit against Dale Himmer (“Himmer”), alleging that Himmer was an NNU investor who received a total of \$16,620.42 in excess of his principal investment with NNU. Himmer thereafter provided verified financial information to the Receiver showing that he would not be able to pay any judgment obtained against him. On or about January 8, 2014, the Receiver entered into a Settlement Agreement and Release with Himmer, subject to Court approval, agreeing to compromise the Receivership Estate’s claim against him based on demonstrated financial hardship and circumstances. Under the Agreement, the parties have agreed to mutual releases, with Himmer being barred from asserting any claims against or receiving any distribution from the Receivership Estate.¹²

b. Ainsworth: On June 25, 2013, the Receiver filed suit against Dan Ainsworth (“Ainsworth”), alleging that Ainsworth was an accountant for NNU who received significant salary payments and investment distributions from NNU. Ainsworth thereafter provided financial information to the Receiver showing that most of the payments to him were for salary and that he was underpaid relating to the investment distributions he received. Based thereon, on or about January 17, 2014, the Receiver entered into a Settlement Agreement and Release with Ainsworth, subject to Court approval, agreeing to compromise the Receivership

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

Estate's claim against him based on the nature of the payments to him, his investment losses, and releases of claims by Ainsworth. In exchange, Ainsworth has released two Assignments of Beneficial Interest that had been transferred to him, has waived any claim to recover the losses in his investment, and has provided significant information to the Receiver about his role at NNU. Based on these agreements by Ainsworth, the Receiver has agreed not to seek recovery of the salary payments made to Ainsworth.¹³

c. 106th Southtowne Hotel Management, L.C.: On June 24, 2013, the Receiver filed suit against 106th Southtowne Hotel Management, L.C. ("106th Southtowne"), alleging that 106th Southtowne received \$103,061.20 as a loan from Receivership Entities that had not been repaid. The company thereafter provided financial information to the Receiver showing that it would be unable to pay any judgment obtained against it. Based thereon, on or about January 23, 2014, the Receiver entered into a Settlement Agreement and Release with 106th Southtowne, subject to Court approval, agreeing to compromise the Receivership Estate's claim against it based on demonstrated financial hardship and circumstances. Under the Agreement, the parties have agreed to mutual releases, with 106th Southtowne also agreeing to provide the Receiver evidence that the investments were charged off and that no equity holders have received or will receive any payments in connection with the dissolution of 106th Southtowne. In addition, the company is barred from asserting any claims against or receiving any distribution from the Receivership Estate.¹⁴

d. Elliott: On June 17, 2013, the Receiver filed suit against Charles W. Elliott ("Elliott"), alleging that Elliott was a NNU investor who received a total of \$5,171.45 in

¹³ Receiver Declaration ¶ 7.

¹⁴ Receiver Declaration ¶ 8.

excess of his principal investment with NNU. Elliott thereafter provided verified financial information to the Receiver showing that he would not be able to pay any judgment obtained against him. Based thereon, on or about January 29, 2014, the Receiver entered into a Settlement Agreement and Release with Elliott, subject to Court approval, agreeing to compromise the Receivership Estate's claim against him based on demonstrated financial hardship. Under the Agreement, the parties have agreed to mutual releases, with Elliott being barred from asserting any claims against or receiving any distribution from the Receivership Estate.¹⁵

e. Whitehouse: On June 21, 2013, the Receiver filed suit against Carla Whitehouse ("Whitehouse"), alleging she received a total of \$14,592.85 in excess of her principal investment with NNU. On January 30, 2014, the Receiver entered into a Settlement Agreement and Release with Whitehouse, subject to Court approval, under which Whitehouse has agreed to repay the entire \$14,592.85 to the Receivership Estate. Whitehouse has paid the full amount to the Receiver.¹⁶

f. Nielsen: On June 21, 2013, the Receiver filed suit against Ashley Nielsen ("Nielsen"), alleging that Nielsen was an NNU investor who received a total of \$142,687.81 in excess of her principal investment with NNU. Nielsen thereafter provided verified financial information to the Receiver showing that she lacked the financial ability to repay any of the excess amounts he received and, based thereon, on March 4, 2014, the Receiver entered into a Settlement Agreement and Release with Nielsen, subject to Court approval, agreeing to compromise the Receivership Estate's claim against her based on demonstrated financial hardship and circumstances. Under the Agreement, the parties have agreed to mutual releases,

¹⁵ Receiver Declaration ¶ 9.

¹⁶ Receiver Declaration ¶ 10.

with Nielsen being barred from asserting any claims against or receiving any distribution from the Receivership Estate.¹⁷

g. On June 25, 2013, the Receiver filed suit against the Estate of Leo Pavich (“Pavich Estate”), alleging that Leo Pavich received funds from National Note on a loan Leo Pavich had made to a third person. The Attorney for the Pavich Estate provided information to the Receiver regarding the loan made by Leo Pavich and amounts Leo Pavich received from National Note. Based thereon, on or about March 7, 2014, the Receiver entered into a Settlement Agreement and Release with the Pavich Estate, subject to Court approval, agreeing in part to compromise the Receivership Estate’s claim against it. Under the Agreement, the Pavich Estate has agreed to pay and has paid \$10,000.00 to the Receivership Estate. The parties have also agreed to mutual releases.¹⁸

III.

APPLICABLE LAW AND ANALYSIS

6. The Receiver requests that the Court approve the above-described Settlement Agreements. In support hereof, the Receiver provides the following analysis.

7. Courts recognize that a “receiver has the power, when so authorized by the court, to compromise claims either for or against the receivership and whether in suit or not in suit.”¹⁹

8. “In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the

¹⁷ Receiver Declaration ¶ 11.

¹⁸ Receiver Declaration ¶ 12.

¹⁹ *Sec. & Exch. Comm’n v. Credit Bankcorp, Ltd.*, No. 99 CIV. 11395, 2001 WL 1658200, at *2 (S.D.N.Y. Dec. 27, 2001) (quoting 3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d Ed. 1959)).

product of collusion between the parties.”²⁰ The Court in *Jones* explained:

In assessing whether the settlement is fair, reasonable and adequate the trial court should consider: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.²¹

9. Here, each of the Settlement Agreements and Release is “fair, reasonable and adequate” for at least the following reasons: (a) they were fairly and honestly negotiated at arm’s length and in good faith by the parties; (b) the value of an immediate recovery outweighs the mere possibility of future relief after potentially protracted and expensive litigation; and (c) the terms of the respective proposed settlements are fair and reasonable. Furthermore, while the Receiver is confident of his right to recover on the claims at issue and there may be no doubt as to the ultimate outcome of the litigation, risks associated with litigation are inherent and those risks, together with potential collection risks and the costs associated therewith, make the proposed settlements fair, adequate and reasonable.²²

10. The Receiver, in an exercise of his business judgment, has determined that each of the Settlement and Agreements and Releases is in the best interest of the Receivership Estate taking into account the information that he has been provided related to each of the Defendants and the facts surrounding their transactions with NNU and/or their ability to pay a potential judgment, potential claims that may exists against the Receivership Estate, and/or the inherent

²⁰ *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).

²¹ *Jones*, 741 F.2d at 324.

²² Receiver Declaration ¶ 13.

costs and delay associated with litigation.²³

11. Together, these Settlement Agreements and Releases will result in the payment of approximately \$24,500.00 to the Receivership Estate, the release of two Assignments of Beneficial Interest, and the release of approximately \$38,000 in claims that otherwise could be asserted against the Receivership Estate. These settlements also will allow the Receiver to avoid expending additional time and legal fees pursuing litigation that is unlikely to result in a recovery for the Receivership Estate.²⁴

12. Each of the Settlement Agreements and Releases was negotiated fairly and honestly, and is the result of an arm's length transaction. There has been no collusion between the parties.²⁵

13. In light of these factors, the Receiver believes these settlement agreements are just and fair and should be approved.²⁶

²³ Receiver Declaration ¶ 14.

²⁴ Receiver Declaration ¶ 15.

²⁵ Receiver Declaration ¶ 16.

²⁶ Receiver Declaration ¶ 17.

CONCLUSION

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit A**, approving the Settlement Agreements and Releases described above.

DATED this 10th day of March, 2014.

DORSEY & WHITNEY LLP

 /s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Jeffrey M. Armington
Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S SEVENTH MOTION AND MEMORANDUM IN SUPPORT REQUESTING ORDER APPROVING SETTLEMENT AGREEMENTS (DALE HIMMER; DAN AINSWORTH; 106TH SOUTHTOWNE HOTEL MANAGEMENT, L.C.; CHARLES W. ELLIOTT; CARLA WHITEHOUSE; ASHLEY NIELSEN; AND THE ESTATE OF LEO PAVICH)** (the "Motion") was filed with the Court on this 10th day of March, 2014, and served via ECF on all parties who have requested notice in this case.

/s/ Jeffrey M. Armington

Furthermore, I certify that on the 10th day of March 2014, the Motion was served on the following parties by electronic mail:

Dale Himmer
c/o Barry Toone, Esq.
toone@millerguymon.com

Dan Ainsworth
Dainsworth1952@gmail.com

106th Southtowne Hotel Management, L.C.
c/o David J. Halling
djhalling@msn.com

Charles W. Elliott
Welliot7@gmail.com

Carla Whitehouse
Carlacraig4@q.com

Ashley Nielsen
anielsenfl@gmail.com

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c/o Robert Stansfield, Esq.
legalbard@aol.com

/s/ Jeffrey M. Armington