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

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, and individual,</p> <p style="text-align: right;">Defendants.</p>	<p>RECEIVER’S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH KIM HUMPHERYS IRA, RICH H. HUMPHERYS ROTH IRA, AND RICH H. HUMPHERYS TRADITIONAL IRA AND MEMORANDUM IN SUPPORT</p> <p>2:12-cv-00591 BSJ</p> <p>The Honorable Bruce S. Jenkins</p>
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R. Wayne Klein, the Court-Appointed Receiver (the “Receiver”) of National Note of Utah, LC and Wayne LaMar Palmer (“Palmer”), together with any and all subsidiaries and affiliated entities and by and through counsel (all entities collectively, “National Note” or “NNU”), respectfully requests that the Court enter an Order in the form attached hereto as **Exhibit A** (the “Proposed Order”) approving a settlement agreement (the “Agreement”) attached hereto as **Exhibit B** dated as of February 14, 2013, by and between the Receiver on one hand and Kim Humpherys IRA, Rich H. Humpherys Roth IRA, and Rich H. Humpherys Traditional IRA

(collectively, “Humpherys”) on the other hand. This Motion is supported by the *Declaration of R. Wayne Klein* filed contemporaneously herewith (the “Receiver Declaration”). The Securities and Exchange Commission (the “SEC”) has informed the Receiver that it does not object to the relief requested in this Motion.

In support hereof, the Receiver states as follows:

MEMORANDUM OF SUPPORT

I.
BACKGROUND

Humpherys and the Deeds of Trust

1. Upon information and belief, in or around 2011, Humpherys purchased a promissory note issued by National Note directly from Ken and Tina Lawrence (the “Original Note”). At the time of Humpherys purchase of the Original Note, the Original Note had an outstanding balance of \$43,792.28.¹

2. Then, on or about September 21, 2011, Humpherys invested an additional \$100,000.00 with National Note and National Note issued Humpherys a new promissory note reflecting the \$100,000.00 investment and the outstanding balance of the Original Note (the “Note”), a copy of which is attached to the Receiver Declaration as Exhibit A.²

3. The Note is secured by a “Deed of Trust” held by Humpherys, which was recorded in the Utah County Recorder’s Office on September 21, 2011, as Entry No. 66813:2011 (the “Deed of Trust”), a copy of which is attached to the Receiver Declaration as Exhibit B.³

4. The real property secured by the Deed of Trust is described as follows:

¹ Receiver Declaration at ¶ 4.

² Receiver Declaration at ¶ 5; Exh. A (Note).

³ Receiver Declaration at ¶ 6; Exh. B (Deed of Trust).

Unit 109, contained within Phase 1, EXPRESSWAY BUSINESS PARK CONDOMINIUMS, Spanish Fork, Utah, as the same is identified in the Recorded Survey Map recorded in Utah County, Utah, on August 20, 2004, as Entry No. 96131, and Map Filing No. 645-119 (as said Record of survey Map may have heretofore been amended or supplemented) and in the Declaration of Condominium recorded in Utah County, Utah as Entry No. 132860:2004 (as said Declaration may have heretofore been amended or supplemented.)

Together with an undivided ownership interest in the Common Areas and Facilities which are appurtenant to said Unit as more particularly described in said Declaration (as said Declaration may have heretofore been amended or supplemented) (the “Property”).⁴

5. The Property has an address of 1249 East 1010 North, Spanish Fork, Utah.⁵

6. John Limpert, of Van Drimmelen & Associates, Inc., conducted an appraisal of the Property and concluded that as of September 20, 2012, the Property had a market value of \$140,000.00 (the “Appraisal”).⁶ A copy of the Appraisal is attached as Exhibit C to the Receiver Declaration.

7. National Note made \$4,674.06 in interest payments to Humpherys, but National Note has not paid Humpherys pursuant to the terms of the Note and is in default.⁷

8. As of July 1, 2012, the outstanding principal amount owed by National Note to Humpherys on account of the Note was \$142,101.92.⁸

The Present Action and The Receivership Order

9. On June 25, 2012, the above-captioned case was commenced by the SEC against Defendants National Note and Palmer (collectively, the “Receivership Defendants”), and in

⁴ Receiver Declaration at Exh. B (Deed of Trust); Exh. A.

⁵ Receiver Declaration at ¶ 8.

⁶ Receiver Declaration at ¶ 9; Exh. C (Appraisal)

⁷ Receiver Declaration at ¶ 10.

⁸ Receiver Declaration at ¶ 11.

conjunction therewith the Court entered, in relevant part, an Order Appointing Receiver and Staying Litigation (the “Receivership Order”).⁹ Pursuant to the Receivership Order, the Receiver was appointed, and National Note and all Palmer’s assets were placed in the Receiver’s control.¹⁰

10. 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 . . . [.]”¹¹
- “To take custody, control and possession of all Receivership Property and records . . . [.]”¹²
- “To use Receivership Property for the benefit of the Receivership Estates and hold in his possession, custody and control all Receivership Property, pending further Order of this Court[.]”¹³
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities”¹⁴
- “[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.”¹⁵
- “[L]ocate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due

⁹ Docket No. 9 (Receivership Order).

¹⁰ *See generally, id.*

¹¹ *Id.* at ¶ 7(A).

¹² *Id.* at ¶ 7(B).

¹³ *Id.* at ¶ 7(D).

¹⁴ *Id.* at ¶ 19.

¹⁵ *Id.* at ¶ 37.

regard to the realization of the true and proper value of such real property.”¹⁶

- “[S]ell, 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.”¹⁷

The Property and Valuation

11. The Property is located in Spanish Fork, Utah, and is part of a business park containing 46 business condominium units that were built by National Note. The Property is currently unoccupied and the Receiver has been paying owners’ association dues and basic utilities for the Property.¹⁸

12. On September 20, 2012, the Property was appraised at a market value of \$140,000, which is less than amounts owed on the Property.¹⁹

II. **ANALYSIS OF THE AGREEMENT**

Under the proposed Agreement, the Receiver will transfer ownership of the Property as is where is to Humpherys pursuant to a quitclaim deed after entry of an Order authorizing him to do so.²⁰ In return, Humpherys will release the Receiver and the receivership estate and otherwise waive any and all claims that they might have against the receivership estate, including any and all assets that are recovered by the Receiver for the benefit of the receivership estate.²¹ In addition, Humpherys will pay all property taxes that are owed on this property and any costs associated with the property transfer. At this time, it appears that total back property taxes are

¹⁶ *Id.* at ¶ 38.

¹⁷ *Id.* at ¶ 39.

¹⁸ Receiver Declaration at ¶ 12.

¹⁹ *See* Receiver Declaration at ¶ 13; Exh. C (Appraisal).

²⁰ *See* Agreement at ¶ 2; Receiver Declaration at ¶ 14.

²¹ *See* Agreement at ¶ 3; Receiver Declaration at ¶ 15.

owed in the amount of \$4,443.94.²²

The Receiver has negotiated with Humpherys at arm's length and in good faith, and as discussed in further detail below, believes that the proposed Agreement is fair, adequate and reasonable, as well as in the best interest of the receivership estate.²³ The Receiver has evaluated the Deed of Trust, the obligations it secures, the value of the Property, potential litigation costs associated with Humpherys exercising any rights that they may have as against the Property, potential litigation risks, the releases provided to the receivership estate under the Agreement, and the receivership estate's interest in the Property. Based thereon, the Receiver has determined that, although he may have valid claims in relationship to these matters, settlement of any and all disputes with Humpherys pursuant to the terms of the Agreement is in the best interest of the receivership estate.²⁴

III. LEGAL ANALYSIS

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."²⁵ "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 product of collusion between the parties."²⁶ In *Jones v. Nuclear Pharmacy, Inc.*,²⁷ the Court of Appeals for the Tenth

²² See Receiver Declaration at ¶ 16; Exh. D (2011 Tax Assessment); Exh. E (2012 Tax Notice).

²³ See Receiver Declaration at ¶ 17.

²⁴ Receiver Declaration at ¶ 18.

²⁵ *SEC v. Bancorp*, 2001 WL 1658200 *2 (S.D.N.Y. 2001) (quoting 3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d Ed. 1959).

²⁶ *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); see also *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984).

²⁷ *Id.*

Circuit has stated:

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.²⁸

Each of these factors has been met in the current case.

The Agreement with Humpherys is “fair, adequate, and reasonable.” It was negotiated in good faith between disinterested parties and at arm’s length.²⁹ As discussed above, while the Receiver may have valid claims related to the Deed of Trust that could be the subject of litigation, litigation of these claims likely would be costly and the outcome would not be certain. Furthermore, and most importantly, given the value of the Property, including as established by the recent Appraisal by an independent professional appraiser, there does not appear to be significant worth in the Property that would be recovered for the benefit of the estate, especially with consideration of the risks and costs of litigation.³⁰ Indeed, the Property is worth less than the amount of the principal debt claimed to be secured by the Deed of Trust, thus giving rise to potential foreclosure by Humpherys.³¹ Therefore, for any value to inure to investors, the Receiver would have to sell the Property for more than \$20,000 over its market value after paying any real estate commissions, and back taxes.³² Further, issues related to viability of claims of the receivership estate related to the validity and avoidability of the Deed of Trust

²⁸ *Id.*

²⁹ Receiver Declaration at ¶ 17.

³⁰ Receiver Declaration at ¶ 18.

³¹ Receiver Declaration at ¶ 19.

³² Receiver Declaration at ¶ 20.

likely would be contested by Humpherys, and the outcome is uncertain.³³ Accordingly, given the absence of equity in the Property, the costs associated with maintaining, marketing and selling the Property, the releases in the Agreement that will benefit the estate, and the litigation risks associated with any claims that the Receiver may have related to the Deed of Trust or amounts due under the Note, it is unlikely the Receiver would be able to realize any “equity” in this property for the benefit of investors.³⁴

Additionally, the Agreement is reasonable and the receivership estate will receive some immediate benefit inasmuch as Humpherys will pay all taxes related to the Property and will not assert any claim against the receivership estate. The Agreement also avoids the expenditure of any additional administrative costs by the Receiver and his professionals that otherwise might be incurred in maintaining or marketing the Property or in responding to any motion by Humpherys seeking the Court’s permission to foreclose on the Property.³⁵

In light of all of the representations made herein and the applicable law, the Receiver submits that the Agreement is fair, adequate and reasonable and, therefore, should be approved by the Court.

³³ Receiver Declaration at ¶ 21.

³⁴ Receiver Declaration at ¶ 21.

³⁵ Receiver Declaration at ¶ 22.

CONCLUSION

For the foregoing reasons, the Receiver asks the Court to enter an Order authorizing the Receiver to enter into the Agreement.

DATED this 27th day of March, 2013.

DORSEY & WHITNEY LLP

/s/ Jeffrey M. Armington

Peggy Hunt
Chris Martinez
Jeffrey M. Armington
Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH KIM HUMPHERYS IRA, RICH H. HUMPHERYS ROTH IRA, AND RICH H. HUMPHERYS TRADITIONAL IRA AND MEMORANDUM IN SUPPORT (the "Motion")** was filed with the Court on this 27th day of March 2013 and was served on all parties who have requested service through the Court via ECF/CM.

In addition on this 27th day of March 2013, the Motion was served on the by e-mail on the following parties:

R. Wayne Klein
KLEIN & ASSOCIATES, PLLC
10 Exchange Place, Suite 502
Salt Lake City, UT 84111
wklein@kleinutah.com
Court-Appointed Receiver

Finally, on this 27th day of March 2013, the Motion was served by U.S. First Class mail, postage pre-paid, on the following:

Wayne L. Palmer
8816 S. 2240 West
West Jordan, UT 84088
Defendant

Rich H. Humpherys,
1055 North Washington Blvd
Ogden, UT 84404

Bank of Utah
c/o Jodie LeBlanc
2605 Washington Blvd
Ogden, UT 84401

/s/ Jeffrey M. Armington