

Peggy Hunt (Utah State Bar No. 6060)
Chris Martinez (Utah State Bar No. 11152)
Tyson C. Horrocks (Utah State Bar No. 12557)

DORSEY & WHITNEY LLP

136 South Main Street, Suite 1000

Salt Lake City, UT 84101-1685

Telephone: (801) 933-7360

Facsimile: (801) 933-7373

Email: hunt.peggy@dorsey.com

martinez.chris@dorsey.com

horrocks.tyson@dorsey.com

Attorneys for Court-Appointed Receiver R. Wayne Klein

**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 MOTION AND
MEMORANDUM IN SUPPORT
REQUESTING ORDER APPROVING
SETTLEMENT AGREEMENTS**

**(Judith Moore; Oscar F. and Ana
Gonzalez and Affiliated Entities;
Steve Larvick; Steven Francis; Deborah
Tanzer-Cohen and Donald Cohen;
Ronald Taylor; Kent and Kay Baldwin
and Tracy Peterson; Carole Marie
Monsen Trust)**

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

¹ Docket No. 9 (Receivership Order).

² *See generally, id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

- “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
- “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 monies paid by the Receivership Defendants to such parties.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, the Receiver has entered into eight Settlement Agreements and Releases with certain parties.¹⁰ Each

⁵ *Id.* at ¶ 7(C).

⁶ *Id.* at ¶ 7(D).

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 7(J).

⁹ Declaration of Receiver R. Wayne Klein in Support of Receiver’s Motion and Memorandum in Support Requesting Order Approving Settlement Agreements (Judith Moore; Oscar F. and Ana Gonzalez and Affiliated Entities; Steve Larvick; Steven Francis) (“Receiver Declaration”) ¶ 3 filed concurrently herewith.

¹⁰Receiver Declaration ¶ 4.

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 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. Moore. On March 7, 2013, the Receiver entered into a Settlement Agreement and Release with Judith Moore ("Moore"), an NNU investor who was paid \$3,177.95 in excess of the amounts she invested. Under the Settlement Agreement, the entire amount of overpayment will be returned, but based on issues of financial hardship which have been verified by the Receiver, Moore will have until December 31, 2013 to complete the repayment—with minimum amounts due each month. The Settlement Agreement and Release provides for Moore's full release of claims against or to any right to distribution from the Receivership Estate.¹²

b. Gonzalez, A1 and Platinum: On March 18, 2013, the Receiver entered into a Settlement Agreement and Release with Oscar F. and Ana Gonzalez (collectively, "Gonzalez"), A1 Trading Powerhouse, Inc. ("A1") and Platinum Properties Group, Inc. ("Platinum"). Upon information and belief, A1, an NNU investor, and Platinum are companies owned and controlled by Gonzalez. The Receiver asserts that A1 received \$26,044.47 in

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

overpayments on its NNU investments, and Gonzalez and Platinum, in turn, have asserted claims against the Receivership Estate related to monies owed to them for certain real estate purchased from Receivership Defendants. Under the Settlement Agreement, a total of \$15,000.00 will be paid to the Receiver for the benefit of the Receivership Estate by no later than September 15, 2013, with this total sum being paid in installment payments over time. The Receiver has already received installment payments pursuant to the Settlement Agreement. The Settlement Agreement and Release provides for a full release of claims against or to any right to distribution from the Receivership Estate.¹³

c. Larvick: On March 28, 2013, the Receiver entered into a Settlement Agreement and Release with Steve Larvick ("Larvick"), who is an NNU investor who received \$171,574.19 in overpayments on his investments. Under the Agreement, Larvick has agreed to repay the full overpayment to the Receiver for the benefit of the Receivership Estate by a date certain. The Settlement Agreement and Release provides for a full release of claims against or to any right to distribution from the Receivership Estate, and Larvick represents therein that that he was unaware of financial problems with NNU when he received payment and that he had no role in managing NNU or soliciting other investors.¹⁴

d. Francis: On April 8, 2013, the Receiver entered into a Settlement Agreement and Release with Steven Francis ("Francis"), an NNU investor who received \$8,647.23 in overpayments on his investments. Under the Agreement, Francis has repaid the full overpayment to the Receiver for the benefit of the Receivership Estate by a date certain. The Settlement Agreement and Release provides for a full release of claims against or to any right to

¹³ Receiver Declaration ¶ 7.

¹⁴ Receiver Declaration ¶ 8.

distribution from the Receivership Estate, and Francis represents therein that he was unaware of financial problems with NNU when he received payment and that he had no role in managing NNU or soliciting other investors.¹⁵

e. Cohen. On April 5, 2013, the Receiver entered into a settlement agreement with Deborah Tanzer-Cohen and Donald Cohen (“Cohens”), investors who were paid \$20,327.25 in excess of the amounts they invested. Under the Agreement, the Cohens will repay \$7,500.00 of the overpayments. Based on their demonstrated financial hardship, the Cohens would be allowed to pay this reduced amount and to have until December 31, 2013 to complete the payments, with \$2,500.00 due each quarter. The Agreement provides for the Cohens’ full release of claims against or to any right to distribution from the Receivership Estate.¹⁶

f. Taylor. On April 16, 2013, the Receiver entered into a Settlement Agreement and Release with Ronald Taylor (“Taylor”), an NNU investor who received \$7,137.99 in overpayments on his investments. Under the Agreement, Taylor has repaid the full overpayment to the Receiver for the benefit of the Receivership Estate. The Settlement Agreement and Release provides for a full release of claims against or to any right to distribution from the Receivership Estate, and Taylor represents therein that he was unaware of financial problems with NNU when he received payment and had no role in managing NNU or soliciting other investors.¹⁷

g. Baldwin and Peterson. On April 12, 2013, the Receiver entered into a Settlement Agreement with Kent and Kay Baldwin (“Baldwins”) and Tracy Peterson (“Peterson”), their son. The Baldwins were overpaid by \$3,141.92 in their investments with National Note. The

¹⁵ Receiver Declaration ¶ 9.

¹⁶ Receiver Declaration ¶ 10.

¹⁷ Receiver Declaration ¶ 11.

Baldwins provided information regarding their financial inability to return the overpayments and requested that the amount of their overpayments be credited against the investment losses of their son, Peterson. Under the Settlement Agreement, Peterson will reduce the amount of his potential claim from \$37,200.00 to \$20,000.00. The Baldwins release all claims against or to any right to distribution from the Receivership Estate, and Peterson releases all claims above \$20,000.00 against or to distribution from the Receivership Estate.¹⁸

h. Carole Marie Monsen Trust. On April 11, 2013, the Receiver entered into a Settlement Agreement and Release with the Carole Marie Monsen Trust (“Monsen”), a lender to Indian Canyon, LLC, an affiliate of National Note. Monsen holds a deed of trust on property owned by Indian Canyon. Under the Settlement Agreement, the Receiver will pay \$2,500.00 to Monsen. In return, Monsen will release its deed of trust on the property and release all claims against or to any right to distribution from the Receivership Estate.¹⁹

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.” *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)).

¹⁸ Receiver Declaration ¶ 12.

¹⁹ Receiver Declaration ¶ 13.

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 product of collusion between the parties." *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). 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.

Id.

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.²⁰

10. In the case of the Settlement Agreements and Releases with Moore, Larvick, Francis and Taylor, the Receivership Estate will obtain full recovery of overpaid funds either in lump sum or over time.

²⁰ Receiver Declaration ¶ 14.

11. In the case of the Settlement Agreement and Release with Gonzalez, A1 and Platinum, the Receivership Estate will receive a compromised sum of the overpayment in exchange for a full release of claims and actions that these parties may have against the Receivership Estate. Based on the Receiver's analysis of the potential adverse claims, which have been asserted to exceed \$100,000, he has determined in his business judgment that the amount to be paid to the Receivership Estate under the Settlement Agreement and Release is fair, reasonable and adequate.²¹

12. In the case of the Settlement Agreement and Release with the Cohens, the Receivership Estate will receive a compromised sum of the overpayment that reflects the Cohens' inability to repay the full amount. Based on the Receiver's analysis of the Cohens' financial condition, he has determined in his business judgment that this amount is significantly more than the Receivership Estate would recovery if the Cohens were to file for bankruptcy. Based upon information, if the Receiver were to file suit against the Cohens seeking the full amount, the Cohens would seek bankruptcy protection.²²

13. For the settlement with the Baldwins and Peterson, the Receivership Estate will be benefitted by a reduction of claims in the amount of \$17,500.00 from Peterson, which will have much of the same effect in the overall recovery for other claimants as the payment of cash. Based on the Receiver's analysis of the Baldwins' financial condition, he has determined in his business judgment that that this is the best benefit that can be obtained.²³

14. The settlement with the Monsen Trust will result in the Receiver being able to get the deed of trust against property in which the Receiver claims an interest released for about 75%

²¹ Receiver Declaration ¶ 15.

²² Receiver Declaration ¶ 16.

²³ Receiver Declaration ¶ 17.

of the amount owed on the debt. The Receiver has determined in his business judgment that getting this deed of trust released at a discounted amount, with a release of all potential claims that the lender might assert, is in the best interests of the Receivership Estate.²⁴

15. 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

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

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 22nd day of April, 2013.

DORSEY & WHITNEY LLP

/s/ Tyson C. Horrocks

Peggy Hunt

Chris Martinez

Tyson C. Horrocks

Attorneys for Receiver

²⁴ Receiver Declaration ¶ 18.

²⁵ Receiver Declaration ¶ 19.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION AND MEMORANDUM IN SUPPORT REQUESTING ORDER APPROVING SETTLEMENT AGREEMENTS Judith Moore; Oscar F. and Ana Gonzalez and Affiliated Entities; Steve Larvick; Steven Francis; Deborah Tanzer-Cohen and Donald Cohen; Ronald Taylor; Kent and Kay Baldwin and Tracy Peterson; Carole Marie Monsen Trust** was filed with the Court on this 22nd day of April, 2013, and served via ECF on all parties who have requested notice in this case.

/s/ Tyson C. Horrocks

Furthermore, I certify that on the 22nd day of April, 2013, the Motion was served on the following parties by U.S. Mail postage prepaid:

Wayne Palmer
8816 South 2240 West
West Jordan, Utah 84088
Defendant

Judith Moore
PO Box 249
Midway, UT 84049

Oscar F. and Ana Gonzalez
2736 Oakbrook Manor
Weston, FL 33332

Steve Larvick
c/o Malcomn Pippin, Esq.
Pippin Law Firm
PO Box 1487
Willston, ND 58802

Steven Francis
c/o Craig J. Carlston, Esq.
Daines & Jenkins, LLP
108 North Main, Suite 200
Logan, UT 84321

Deborah and Donald Cohen
c/o Marla Sones, Esq.
Max L. Lieberman & Associates
488 Norristown Road, Suite 140
Blue Bell, PA 19422-2352

Ronald Taylor
c/o Robert Tateoka, Esq.
Law Office of Derek Coulter
11576 S. State Street, Suite 503
Draper, UT 84020

Kent and Kaye Baldwin
Tracy Peterson
1531 S. East Canyon Drive
Cedar City, UT 84720

Carole Marie Monsen Trust
PO Box 387
Duchesne, UT 84021

/s/ Tyson C. Horrocks