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*Attorneys for Court-Appointed Receiver R. Wayne Klein*

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

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

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

Defendants.

**MOTION TO APPROVE AGREEMENT  
CONCERNING UNDEVELOPED  
ELKHORN PROPERTY AND  
MEMORANDUM IN SUPPORT**

Case No: 2:12-CV-591 BSJ

Judge Bruce S. Jenkins

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R. Wayne Klein, as receiver (the “Receiver”) for Defendant National Note of Utah, LC and the assets of Defendant Wayne LaMar Palmer, respectfully submits this *Motion to Approve Agreement Concerning Undeveloped Elkhorn Property and Memorandum in Support* (the “Motion”). The Motion is also supported by the *Declaration of R. Wayne Klein, Receiver* (the “Receiver Declaration”) filed concurrently herewith.

**MEMORANDUM OF SUPPORT**

**I.**

**SUMMARY**

Elkhorn Ridge, LLC (“Elkhorn”) purchased at total of 278.06 acres of land, which is comprised of five parcels, adjacent to the Elkhorn Ridge Subdivision in Malad, Idaho (the “Property”) from the William Carl A. Evans Testamentary Trust, Joseph W. Lindsey, and Theodore Lindsey (collectively, the “Evans”). The Property was divided into five parcels. A Promissory Note was signed by Elkhorn, which was secured by a Mortgage. The Promissory Note set forth a payment schedule, and each payment corresponded with a separate parcel of the Property. Accordingly, with each payment, the corresponding parcel of the Property would be released and no longer subject to the Mortgage.

Elkhorn made the payments necessary to pay for three of the Property’s five parcels. Elkhorn also made most of the payment necessary to purchase the fourth parcel. However, Elkhorn did not make the payment necessary to purchase the fifth parcel and is in default under the terms of the Promissory Note. The Evans have a valid, secured interest in the fifth parcel and are entitled to foreclose upon that parcel as a result of Elkhorn’s default.

This Motion asks the Court to approve an agreement whereby the Receiver abandons the fifth parcel to Evans. In exchange, Evans will waive any claims they may have against the Receivership Estate and the first three parcels. Moreover, the Evans have agreed that rather than foreclose on the entire fourth parcel, that parcel will be split, with the Receivership obtaining the portion of the fourth parcel that corresponds to the partial payment made by Elkhorn on that parcel.

**II.**

**RELIEF SOUGHT**

The Receiver seeks an order from the Court (1) authorizing the Receiver to immediately relinquish, disclaim, and abandon all of the interest of the Receivership Estate in certain portions of the Property described below, with legal descriptions being set forth in the documents attached to the Receiver Declaration, (2) lifting the stay of litigation to allow Evans to exercise its foreclosure remedies as to certain portions of the Property, and (3) approving the terms of the parties' agreement described below, and which is attached to the Receiver Declaration.

**III.**

**STATEMENT OF FACTS**

**The Receiver and the Receivership Estate**

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").<sup>1</sup>

2. Pursuant to the Receivership Order, the Receiver was appointed, and NNU, forty-one of its affiliated companies (the "Palmer Entities"), including Elkhorn Ridge, LLC, and all Palmer's assets were placed in the Receiver's control.<sup>2</sup>

3. The Court has directed and authorized the Receiver to, among other things,

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<sup>1</sup> Docket No. 9 (Receivership Order).

<sup>2</sup> See generally, *id.*

manage the assets of the receivership estates, including the following:

- “[D]etermine the nature, location and value of all property interests of the Receivership Defendants and the Palmer Entities . . . [.]”<sup>3</sup>
- “To take custody, control and possession of all Receivership Property and records . . . [.]”<sup>4</sup>
- 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.<sup>5</sup>
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities . . . .”<sup>6</sup>
- “[T]ransfer, compromise, or otherwise dispose of any Receivership Property . . . 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” after Court approval.<sup>7</sup>
- “[T]ransfer clear title to[] all real property in the Receivership Estates” upon order of the Court.<sup>8</sup>

4. The Receivership Order further provides for a stay of all litigation, enjoins acts that will interfere with the Receiver’s control of property of the receivership estate, and enjoins all actions with respect to property of the Receivership Estate, including the Elkhorn Property described in detail below.<sup>9</sup>

#### **The Property and Evans’ Secured Interests**

5. On or about February 1, 2008, Elkhorn purchased the Property, which consists of

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<sup>3</sup> *Id.* at ¶ 7(A).

<sup>4</sup> *Id.* at ¶ 7(B).

<sup>5</sup> *Id.* at ¶ 7(C).

<sup>6</sup> *Id.* at ¶ 19.

<sup>7</sup> *Id.* at ¶ 37.

<sup>8</sup> *Id.* at ¶ 39.

<sup>9</sup> *Id.* ¶¶ 3, 29, 32-34.

a total of 278.06 acres of land near Malad, Idaho.<sup>10</sup> According to the relevant documents, the Property was purchased from (a) the William Carl Evans Testamentary Trust, which owned an undivided 50% interest in the land; (b) Joseph W. Evans, who owned an undivided 25% interest in the Property; and (c) Theodore P. Lindsey, who owned an undivided 25% in the Property.<sup>11</sup> At the closing, the Evans deeded the Property to Elkhorn.<sup>12</sup>

6. The purchase price was \$3,000.00 per acre, or \$834,180.00 for the entire 278.06 acres, which was to be made in five payments.<sup>13</sup> Elkhorn paid \$240,000.00 to the Evans at the time of the closing and signed a Promissory Note in favor of the Evans pursuant to which Elkhorn agreed to a payment schedule for the remaining \$594,180.00 owed to the Evans.<sup>14</sup> The Promissory Note was secured by a Mortgage.<sup>15</sup>

7. The Property was divided into five parcels, labeled 3-A through 3-E. The full legal descriptions for these parcels are attached as **Exhibit D** through **Exhibit H** to the Receiver Declaration. The five payments that Elkhorn agreed to make to the Evans under the Promissory Note corresponded to each of these five parcels. Elkhorn's first payment in the amount of \$240,000.00 made at the time of closing corresponded to an 80 acre parcel labeled as "Parcel 3-A." Accordingly, on the date of the closing, the Evans released any claim they had to Parcel 3-A.<sup>16</sup>

8. Elkhorn made the second payment in the amount of \$126,000.00 due under the Promissory Note, and the Evans released their secured interest on the 42.0 acre parcel labeled as

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<sup>10</sup> Receiver Declaration, at ¶ 4.

<sup>11</sup> *Id.*

<sup>12</sup> A true and correct copy of the Deed is attached as **Exhibit A** of the Receiver Declaration.

<sup>13</sup> Receiver Declaration at ¶ 5.

<sup>14</sup> A true and correct copy of the Promissory Note is attached as **Exhibit B** of the Receiver Declaration.

<sup>15</sup> A true and correct copy of the Mortgage is attached as **Exhibit C** of the Receiver Declaration.

<sup>16</sup> Receiver Declaration at ¶ 6.

“Parcel 3-B.”<sup>17</sup>

9. Elkhorn also made the third payment in the amount of \$156,000.00 due under the Promissory Note, and the Evans released their secured interest on the third 52.0 acre parcel labeled as “Parcel 3-C.”<sup>18</sup>

10. The fourth parcel, labeled “Parcel 3-D,” is comprised of 52.0 acres. Prior to the Receiver’s appointment, Elkhorn paid \$146,144.80 of the total \$173,952.68 purchase price (including late fees) owed under the Promissory Note for Parcel 3-D.<sup>19</sup>

11. The fifth parcel, labeled “Parcel 3-E” is comprised of 52.06 acres. According to the Promissory Note, Elkhorn agreed to pay \$152,600.00 for this Parcel, but as of the time of the Receiver’s appointment, Elkhorn had not made any portion of that payment to Evans.<sup>20</sup>

12. The Evans claim that Elkhorn is in default under the Promissory Note and Mortgage.<sup>21</sup>

### **Proposed Agreement**

13. The Receiver and Evans have entered into good faith and arm’s length negotiations, and have entered into the agreement attached to the Receiver Declaration as **Exhibit I** (the “Agreement”), subject to approval of this Court.<sup>22</sup> The material provisions of the Agreement are as follows:

- a. The Evans expressly agree that they have no interest in Parcels 3-A, 3-B, and 3-C and expressly waive any claim to ownership or interest in these Parcels.

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<sup>17</sup> *Id.* at ¶ 7.

<sup>18</sup> *Id.* at ¶ 8.

<sup>19</sup> *Id.* at ¶ 9.

<sup>20</sup> *Id.* at ¶ 10.

<sup>21</sup> *Id.* at ¶ 11.

<sup>22</sup> *Id.* at ¶ 12.

- b. Parcel 3-D will be divided into two parcels based on an allocation of acreage to account for the partial payment for this Parcel that Elkhorn made prior to the Receiver's appointment. The allocation and acreage is established based on a survey that has been paid for by both parties and which is attached to the Receiver Declaration as **Exhibit J**. The first, Parcel 3-D(I), will be comprised of approximately 8.31 acres. The legal description of Parcel 3-D(I) is attached to the Receiver Declaration as **Exhibit K**. This Parcel will be retained by Evans, and the Receiver, on behalf of the Receivership Estate, relinquishes any claim to or ownership interest in Parcel 3-D(I). The second, Parcel 3-D(II), will be comprised of approximately 43.68, which corresponds to the number of acres in Parcel 3-D that Elkhorn purchased with its partial payment of \$146,144.80. Parcel 3-D(II) will remain property of the Receivership Estate and the Evans expressly waive any claim to or ownership interest in this Parcel. The legal description of Parcel 3-D(II) is attached to the Receiver Declaration as **Exhibit L**.
- c. The Receiver will relinquish any claim to or ownership interest in Parcel 3-E.
- d. The Receiver and Evans agree to mutually release each other, and to the extent applicable, their respective owners, employees, officers, directors, agents, servants and affiliates. Furthermore, Evans is releasing the Receivership Estate from any and all past, present or future claims, demands, obligations, actions, causes of action, rights, damages, costs, losses of services, expenses and compensation of any nature whatsoever which may accrue or otherwise be acquired on account of or which in any way may have grown out of, or which are the subject of the transactions in question.

**IV.**  
**ARGUMENT**

The Receiver requests that the Court grant this Motion (1) authorizing the Receiver to abandon Parcels 3-D(I) and 3-E, (2) lifting the stay of litigation imposed by the Receivership Order and allowing the Evans to exercise their rights with regard to Parcels 3-D(I) and 3-E, and (3) approving the terms of the Agreement set forth above. Based on the applicable law set forth below, the Court has the discretion to grant the requested relief, and given the facts outlined above, such relief is appropriate.

*First*, this Court has broad equitable discretion to permit the Receiver to relinquish property of the Receivership Estate and to approve agreements related to property of the Receivership Estate, such as the Agreement presently at issue. Here, the Receiver has conducted an investigation of the Property and the interests of the Evans in that Property, and has determined that the Evans' interests in Parcels 3-D(I) and 3-E appear to be valid and perfected.<sup>23</sup> Moreover, based on the Receiver's investigation, the Evans have not been paid the amount owed by Elkhorn under the Promissory Note to purchase these Parcels.<sup>24</sup> Thus, the Receiver has determined that it would be in the best interests of the Receivership Estate to abandon any interest that the Estate has in Parcels 3-D(I) and 3-E and to enter into the Agreement set forth above.<sup>25</sup> The Agreement has the additional benefit of obtaining a release and waiver of claims by the Evans, including a release of any claim to the approximately \$183,987.88 that is owed to the Evans, as well as avoiding any expense of potential litigation.<sup>26</sup> Thus, the Motion should be

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<sup>23</sup> Receiver Declaration ¶ 16.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶ 17.

<sup>26</sup> *Id.*



granted because abandonment of Parcels as proposed and approval of the Agreement will serve the best interests of the Receivership Estate.<sup>27</sup>

Second, the Court has the power to lift its stay of litigation and any freeze of assets.<sup>28</sup> In determining whether a stay should be lifted, the Court considers the four factors set out in *Securities & Exchange Commission v. Wencke*:<sup>29</sup> (1) if the Evans will suffer substantial injury if not permitted to proceed; (2) if the Receiver has had sufficient time to organize and understand the assets under his control; (3) whether the Evans' interest in the Property has merit; and (4) the interests of the parties. Here, each of these factors has been met. Upon information and belief, the Evans will suffer substantial injury if not permitted to proceed because Elkhorn is in default and the Evans have not been able to proceed against its collateral as a result of this case. The Receiver has had sufficient time to investigate the Property and the Evans' interest therein, and<sup>30</sup> the Evans have a valid security interest in Parcels 3-D(1) and 3-E. Finally, the Receiver has determined from his investigation that allowing the abandonment of Parcel 3-D(1) and Parcel 3-E is in the best interest of the Receivership Estate inasmuch as this portion of the Property has not been paid for by Elkhorn, under the Promissory Note, Elkhorn owes the Evans approximately \$183,987.88 for this Property, and the Receiver's investigation shows that the Property is likely worth less than what is owed to the Evans. Accordingly, abandonment relieves the Receivership of the expense of managing this Property, releases the Receiver from the Evans' significant claims, avoids the expense of litigation, and clears away all claims the Evans may have made to

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<sup>27</sup> *Id.*

<sup>28</sup> See *Vescor*, 599 F.3d at 1196 (Noting the purpose of imposing a stay on litigation is to allow the receiver an opportunity to marshal and untangle assets without being forced into court.); *SEC v. Madison Real Estate Group, LLC*, 647 F. Supp.2d 1271, 1275 (D. Utah 2009).

<sup>29</sup> 742 F.2d 1230, 1231 (9th Cir. 1984); see *Vescor*, 599 F.3d at 1196.

<sup>30</sup> *Id.*

Parcels 3-A, 3-B, 3-C, and 3-D(II), thus permitting the Receiver to sell these Parcels.<sup>31</sup>

Accordingly, the Receiver respectfully represents that the relief requested in the Motion related to the lifting the litigation stay is appropriate and, thus, the Motion should be granted.

**V.**

**CONCLUSION**

For all of the reasons stated herein and as supported by the Receiver Declaration, the Receiver respectfully requests that the Court grant the Motion, thus authorizing the Receiver's abandonment of any interest that the Receivership Estate may have in Parcels 3-D(1) and 3-E of the Property, lifting the stay of litigation to allow the Evans to proceed with its remedies in relation to Parcels 3-D(1) and 3-E of the Property, and approving the Agreement described herein.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of April, 2013.

DORSEY & WHITNEY LLP

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

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<sup>31</sup> *Id.*

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the above **DECLARATION OF RECEIVER R. WAYNE KLEIN IN SUPPORT OF RECEIVER'S MOTION TO APPROVE AGREEMENT CONCERNING UNDEVELOPED ELKHORN PROPERTY AND MEMORANDUM IN SUPPORT** was filed with the Court on this 29th day of April, 2013, and served via ECF on all parties who have requested notice in this case, including the following:

Thomas M. Melton  
Daniel J. Wadley  
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and was served via U.S. Mail on this 29th day of April, 2013 on the following:

Wayne Palmer  
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/s/ Chris Martinez\_\_\_\_\_