

Peggy Hunt (Utah State Bar No. 6060)
Chris Martinez (Utah State Bar No. 11152)
Jeffrey M. Armington (Utah State Bar No. 14050)

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

armington.jeff@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 SECOND MOTION
AND MEMORANDUM IN SUPPORT
REQUESTING ORDER APPROVING
SETTLEMENT AGREEMENTS**

**(Hazel J. Ellefsen Family Trust and
Clarence and Darlene Ellefsen; Scott
Beall; Dean T. and Marilyn Bawden;
Monica Packer; John S. and Charlotte
Van Ry and the John & Charlotte Van
Ry Trust; and Ross Paul)**

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

¹ Docket No. 9 (Receivership Order).

² *See generally, id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

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 six 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 Second Motion and Memorandum in Support Requesting Order Approving Settlement Agreements (Hazel J. Ellefsen Family Trust and Clarence and Darlene Ellefsen; Scott Beall; Dean T. and Marilyn Bawden; Monica Packer; John S. and Charlotte Van Ry and the John & Charlotte Van Ry Trust; and Ross Paul) (“Receiver Declaration”) ¶ 3 filed concurrently herewith.

¹⁰ Receiver 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. Ellefsens. On April 17, 2013, the Receiver entered into a Settlement Agreement and Release with the Hazel J. Ellefsen Family Trust (the "Ellefsen Trust"), Clarence Ellefsen ("Clarence"), and Darlene Ellefsen ("Darlene" and together with Ellefsen Trust and Clarence, the "Ellefsens"). The Ellefsen Trust, with Clarence as trustee, is an NNU investor which was paid \$49,671.39 in excess of the amounts it invested. Clarence had a separate investment account with NNU with a principal investment in the amount of \$100,000.00. Darlene also had a separate investment account with NNU with a principal investment in the amount of \$99,000.00. Under the Settlement Agreement, the Receiver will not seek to recover the \$49,671.39 in excess payments to the Ellefsen Trust, while Clarence and Darlene will waive any claims to recovery of funds from the Receivership Estate based on their unpaid principal investments. The Settlement Agreement and Release provides for the Ellefsens' full release of claims against or to any right to distribution from the Receivership Estate.¹²

b. Beall: On April 19, 2013, the Receiver entered into a Settlement

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

Agreement and Release with Scott Beall (“Beall”). The Receiver asserts that Beall is an NNU investor who was paid \$12,117.81 in excess of the amounts he invested. Under the Settlement Agreement, Beall has agreed to repay the full overpayment to the Receiver for the benefit of the Receivership Estate. Based on his demonstrated financial hardship, Beall will pay the full overpayment amount by no later than December 31, 2013, with \$3,000.00 due each quarter, and the balance of \$3,117.81 due by December 31, 2013. 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. Bawdens: On April 29, 2013, the Receiver entered into a Settlement Agreement and Release with Dean T. Bawden and Marilyn Bawden (collectively, the “Bawdens”), who are NNU investors who received \$169,012.16 in overpayments on their investments. Under the Agreement, the Bawdens have agreed to repay the full overpayment to the Receiver for the benefit of the Receivership Estate by a date certain and to execute releases of the assignments of beneficial interest (“ABIs”) held by the Bawdens. The Settlement Agreement and Release provides for a full release of claims against or to any right to distribution from the Receivership Estate.¹⁴

d. Packer: On April 29, 2013, the Receiver entered into a Settlement Agreement and Release with Monica Packer (“Packer”), an NNU investor who received \$15,100.00 in overpayments on her investments. Under the Agreement, Packer will 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

¹³ Receiver Declaration ¶ 7.

¹⁴ Receiver Declaration ¶ 8.

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

e. Van Rys. On April 29, 2013, the Receiver entered into a Settlement Agreement and Release with John S. Van Ry, Charlotte Van Ry, and the John & Charlotte Van Ry Trust (collectively, the “Van Rys”). The Receiver has alleged that the Van Rys received \$55,652.97 in overpayments on their investments, and the Van Rys have alleged that they have suffered over \$405,000.00 in losses based on a number of allegations. Under the Agreement, the Van Rys will pay \$8,000.00 to the Receiver for the benefit of the Receivership Estate by a date certain. The Van Rys will also release any and all liens they hold against properties of the Receivership Estate, including the deed of trust against the Deer Meadows property in Duchesne County, Utah, purporting to secure a debt in the amount of \$40,000.00. The Settlement Agreement and Release provides for a full release of claims against or to any right to distribution from the Receivership Estate.¹⁶

f. Paul. On May 13, 2013, the Receiver entered into a Settlement Agreement with Ross Paul (“Paul”) an NNU investor who received \$6,004.31 in overpayments on his investments. Under the Agreement, Paul will 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 Paul 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.¹⁷

¹⁵ Receiver Declaration ¶ 9.

¹⁶ Receiver Declaration ¶ 10.

¹⁷ Receiver Declaration ¶ 11.

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.”¹⁸

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.”¹⁹ 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.²⁰

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

¹⁸ *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)).

¹⁹ *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).

²⁰ *Id.*

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.²¹

10. In the case of the Settlement Agreements and Releases with Beall, the Bawdens, Packer, and Paul the Receivership Estate will obtain full recovery of overpaid funds either in lump sum or over time.²²

11. In the case of the Settlement Agreement and Release with the Ellefsens, the Receivership Estate will waive its \$49,671.39 claim for overpayments in exchange for the Ellefsens' waiver of \$199,000.00 in claims based upon the unpaid principal amounts owed on their investments. Based on the Receiver's analysis of those claims, he has determined in his business judgment that the reciprocal waiver of claims under the Settlement Agreement and Release is fair, reasonable and adequate.²³

12. In the case of the Settlement Agreement and Release with the Van Rys, the Receivership Estate will receive \$8,000.00 as a compromised sum of the \$55,652.97 in overpayments that reflects the Van Rys' potential claims against the Receivership Estate, which they assert exceed \$405,000.00. In addition, the Van Rys will release any liens they hold on any property owned by the Receivership Estate, including the deed of trust against the Deer Meadows property in Duchesne County, Utah. The Receiver has determined in his business judgment that reducing the amount paid by the Van Rys in exchange for getting the Van Rys to waive their claims against the Receivership Estate and release their liens against property of the

²¹ Receiver Declaration ¶ 12.

²² Receiver Declaration ¶ 13.

²³ Receiver Declaration ¶ 14.

Receivership Estate, is in the best interests of the Receivership Estate.²⁴

13. 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

14. 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 28th day of May, 2013.

DORSEY & WHITNEY LLP

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

²⁴ Receiver Declaration ¶ 15.

²⁵ Receiver Declaration ¶ 16.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S SECOND MOTION AND MEMORANDUM IN SUPPORT REQUESTING ORDER APPROVING SETTLEMENT AGREEMENTS (Hazel J. Ellefsen Family Trust and Clarence and Darlene Ellefsen; Scott Beall; Dean T. and Marilyn Bawden; Monica Packer; John S. and Charlotte Van Ry and the John & Charlotte Van Ry Trust; and Ross Paul)** was filed with the Court on this 28th day of May, 2013, and served via ECF on all parties who have requested notice in this case.

/s/ Jeffrey M. Armington

Furthermore, I certify that on the 28th day of May, 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

Clarence Ellefsen
10149 South 1300 West
South Jordan, UT 84095

Scott Beall
757 Massachusetts Avenue, #403
Indianapolis, IN 46204

Dean & Marilyn Bawden
c/o Mona Burton, Esq.
Holland & Hart
222 South Main, Suite 2200
Salt Lake City, UT 84101

Monica Packer
320 West Arroyo Street
Reno, NV 89509

John & Charlotte Van Ry
PO Box 251
Nephi, UT 84648

Ross Paul
332 West 700 North
Santaquin, UT 84655

/s/ Jeffrey M. Armington