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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: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, an individual,</p> <p style="text-align: center;">Defendants.</p>	<p>RECEIVER’S MOTION SEEKING TURNOVER AND MEMORANDUM OF LAW IN SUPPORT</p> <p>2:12-cv-00591 BSJ</p> <p>The Honorable Bruce S. Jenkins</p>
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R. Wayne Klein, Court-Appointed Receiver in the above-captioned case (the “Receiver”), by and through his counsel, respectfully submits this *Motion Seeking Turnover* (the “Motion”) and Memorandum of Law in support of the same. The *Declaration of R. Wayne Klein* (the “Receiver Declaration”) is attached hereto as **Exhibit A** in further support of the Motion.

The Receiver states as follows:

SUMMARY

Mackay Price and Mecham (“MPM”), prior legal counsel to Defendant Wayne L. Palmer (“Palmer”), obtained \$10,000.00 after the commencement of the above-captioned case which is property of the Receivership Estate. The Receiver made demand on MPM for the return of the funds. MPM has refused to turn over the funds, and also alleges that part of the funds were transferred to Pia Anderson Dorius Reynard & Moss (“PADRM”), successor legal counsel retained by Palmer. The Receiver thus requests that this Court grant the Motion, ordering MPM and/or PADRM (collectively, the “Firms”) to immediately turn over \$10,000.00 to the Receiver for the benefit of the Receivership Estate.

STATEMENT OF FACTS

Background

1. On June 25, 2012, the Securities and Exchange Commission (the “SEC”) filed a Complaint against National Note of Utah, LC and Palmer, thus commencing the above captioned case.
2. On June 25, 2012, the Court entered its (a) *Order Appointing Receiver and Staying Litigation* [Docket No. 9] (the “Receivership Order”); and (b) *Order Freezing Assets and Prohibiting Destruction of Documents* (the “Asset Freeze Order”) (collectively, the “Court Orders”). Copies of the Court Orders are attached as part of **Exhibit 1** to the Receiver Declaration.
3. Pursuant to the Receivership Order, the Receiver was appointed as the receiver in the above-captioned case, and the Court took “exclusive jurisdiction and possession

of the assets, property and interest, of whatever kind and wherever situated of” the Defendants “together with any and all subsidiaries and affiliated entities”¹

The Court Orders

4. The Asset Freeze Order states, in relevant part, that:

IT IS ORDERED that . . . Defendants and their agents . . . attorneys, and those persons in active concert or participation with them who receive actual notice of [this] Order by personal service, facsimile service, or otherwise, and each of them, hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of any assets, funds, or other properties (including money, choses in action or property of any kind whatsoever) of Defendants currently held by them or under their control, whether held in the name of Defendants, or for their direct or indirect benefit wherever situated, and directing each of the financial or brokerage institutions, debtors, and bailees, or any other person or entity holding such assets, funds or other properties of the Defendants to hold or retain within its control and prohibit the withdrawal, removal, transfer, or other disposal of any such assets, funds, or other properties.²

5. This asset freeze is incorporated as part of the Receivership Order, which provides that:

[A]ny and all assets of the Receivership Defendants and the affiliated Palmer Entities (the “Receivership Assets”) are frozen until further order of this Court. Accordingly, all persons and entities with direct or indirect control over any [such assets] are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets.³

¹ Receivership Order ¶ 1.

² Asset Freeze Order ¶ I.

³ Receivership Order ¶ 3.

6. The Receivership Order further provides that any person who receives notice of the Order is “restrained and enjoined” from “directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would:”⁴

- “Interfere with the “Receiver’s efforts to take control” or “possession” of the Receivership Assets, and such prohibited actions “include but are not limited to, using self-help . . . ;”⁵
- “Dissipate or otherwise diminish the value of any Receivership Property” with “prohibited actions” including “disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property . . . ;”⁶ or
- “[I]nterfere in any manner with the exclusive jurisdiction of this Court over the Receivership Estates.”⁷

7. The Receivership Order gives the Receiver the power to “take custody, control and possession of all Receivership Property [and] to sue for and collect, recover, receive and take into possession from third parties all Receivership Property.”⁸

8. Furthermore, the Receiver “may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover . . . and such other relief from this Court as may be necessary to enforce [the Receivership] Order.”⁹

⁴ *Id.* at ¶ 29.

⁵ *Id.* at ¶ 29(A).

⁶ *Id.* at ¶ 29(C).

⁷ *Id.* at ¶ 29(D).

⁸ *Id.* at ¶ 7.b.

⁹ *Id.* at ¶ 43.

9. The Receiver has a duty to “notify the Court and Commission counsel of any failure or apparent failure of any person or entity to comply in any way with the terms of [the Receivership] Order.”¹⁰

Facts Related the Funds Paid to the Firms

10. Prior to the commencement of this case, National Note loaned funds to Innovative Services, LLC (“Innovative”), an entity controlled by Michael D. Memmott, Jr. (“Memmott”). As of the date of the commencement of the case, the Innovative loan had not been repaid.¹¹ Thus, on June 21, 2013, the Receiver commenced an action against Innovative for repayment of the loan (the “Innovative Action”).¹²

11. On or about January 30, 2014, after discussions with Memmott, the Receiver learned that in addition to the Innovative loan, National Note loaned money to Sawtell Capital, LLC (“Sawtell”), an entity owned and controlled by Memmott. Sawtell signed a Promissory Note (the “Note”) that evidenced its obligation to repay a total of \$180,000 to National Note, and Memmott personally guaranteed the Note. Copies of documents relevant to this loan found by the Receiver in National Note’s books and records are attached to the Receiver’s Declaration as **Exhibit 2.**¹³

12. Furthermore, and most relevant here, is that Memmott stated that he had repaid National Note at least part of the Innovative/Sawtell loans. At Palmer’s direction,

¹⁰ *Id.* at ¶ 31.

¹¹ Receiver Declaration ¶ 4.

¹² *Klein v. Innovative Services, LLC*, Case No. 2:13cv00566 (D. Utah) (Warner, J.).

¹³ Receiver Declaration ¶ 5.

Memmott transferred \$10,000.00 to MPM in partial satisfaction of what was owed to National Note. Based on these representations and documents found in the National Note files, the Receiver caused a *Motion for Leave to File First Amended Complaint and Memorandum in Support* to be filed in the Innovative Action, seeking to add Memmott and Sawtell as defendants and to increase the amount sought.¹⁴

13. By letter dated March 4, 2014, a copy of which is attached to the Receiver Declaration as **Exhibit 3**, the Receiver requested that MPM return the \$10,000.00 to him for the benefit of the Receivership Estate. A copy of this letter was filed with the Court and provided to the SEC in compliance with the Receiver's obligations under the Receivership Order.¹⁵

14. On or about March 11, 2014, the Receiver was contacted by MPM's office, and a call to discuss the Receiver's demand was scheduled for March 18, 2014. On the March 18th call, which was attended by members of both of the Firms, the Receiver was informed that (a) Palmer represented to MPM that he had a defense fund that was not funded by receivership monies, and counsel did not inquire further; (b) MPM received \$10,000.00 but the source of the funds was not investigated; (c) for reasons that are unclear, on or about August 15, 2012 MPM's staff obtained from its financial institution a copy of the check that was issued to MPM —at that time the check was not reviewed by the MPM lawyers involved in the case; (d) the check was issued by Sawtell; (e) MPM applied \$3,000.00 of the \$10,000.00 in funds obtained for legal

¹⁴ Receiver Declaration ¶ 6; *see* Innovative Action Docket No. 8 (filed April 9, 2014).

¹⁵ Receiver Declaration ¶ 7; *see* Docket No. 613 (Notice of Receiver's Demand for Turnover of Receivership Property).

services rendered; and (f) \$7,000.00 of the \$10,000.00 was then transferred by MPM to PADRM, as successor law firm retained by Palmer.¹⁶

15. MPM thereafter promptly provided a copy of the check to the Receiver, a copy of which is attached to the Receiver's Declaration as **Exhibit 4**. The check, dated July 20, 2012, is made payable to MPM in the sum of \$10,000.00, and the notation on the check states "Final Loan Payment to Utah National Note and or Wayne Palmer."¹⁷

16. By letter dated April 1, 2014, the Receiver followed up with MPM on his initial demand for turnover, a copy of which is attached to the Receiver Declaration as **Exhibit 5**. The Receiver required that by no later than April 15, 2014, MPM turnover the \$10,000.00, or provide the Receiver with Memmott's affidavit stating that at the time of the transfer, notwithstanding the statement on the face of the check that it was a "Final Loan Payment," Memmott was making a voluntary contribution to assist Palmer with his defense, and that the transfer was in no way intended to be a payment of any monies that Innovative owed to National Note. The Receiver also put MPM on notice that if it did not respond he would be forced to take appropriate action, including seeking contempt and sanctions.¹⁸

17. Neither the \$10,000.00 nor the requested affidavit was turned over by April 15, 2014.¹⁹

¹⁶ Receiver Declaration ¶ 8.

¹⁷ Receiver Declaration ¶ 9 & Exh. 4.

¹⁸ Receiver Declaration ¶ 10 & Exh. 5 at pp. 1-2.

¹⁹ Receiver Declaration ¶ 11.

18. Rather, by letter dated April 8, 2014, a copy of which is attached to the Receiver's Declaration as **Exhibit 6**, MPM addressed some of the issues that it deemed to be relevant "for the record" and indicated it would be "back in touch" on the Receiver's demand.²⁰

19. By letter dated April 16, 2014, a copy of which is attached to the Receiver's Declaration as **Exhibit 7**, MPM informed the Receiver that (a) it was not responsible for the \$7,000.00 that it transferred to PADRM from its client trust fund on Palmer's instruction, and (b) that it would not return the \$3,000.00 that it applied toward its invoices. A copy of the Receiver's April 8 letter was sent to PADRM, and PADRM has not responded in any way.²¹

20. On May 8, 2014, the Receiver provided MPM and PADRM a copy of this Motion and informed them that unless he received the funds in question by no later than May 14, 2014, he would file the Motion with the Court and reserve the right to request fees and costs associated with bringing the Motion.²²

21. By email dated May 9, 2014 to the Receiver from Memmott, a copy of which is attached to the Receiver Declaration as part of **Exhibit 8** ("Memmott Email"), Memmott states:

I am telling you that every penny paid was for the purpose of reducing my liability to Utah National Note and not for the purpose of funding Wayne Palmers defense, any suggestion otherwise is simply false. The check speaks for its self [sic] when it says

**Final Loan Payment
To Utah National Note
and or Wayne Palmer**

²⁰ Receiver Declaration ¶ 12 & Exh. 6 at p. 2.

²¹ Receiver Declaration ¶ 13.

²² Receiver Declaration ¶ 14.

22. On May 14, 2014, MPM contacted the Receiver through his counsel, but no funds were turned over. PADRM did not respond to the Receiver's demand at all.²³

23. On May 29, 2014, the Receiver determined that he would be forced to file this Motion, but he felt it necessary to first inform the Firms of the Memmott Email. Thus, on that day, the Receiver through his counsel sent an email to the Firms, a copy of which is attached as part of **Exhibit 8**. The Receiver informed the Firms that he would file this Motion on May 30, 2014.²⁴

24. To date, the Receiver has not received the funds in question.²⁵

ARGUMENT

Federal courts have broad equitable powers enabling them to fashion appropriate ancillary remedies necessary to grant full relief in receiverships.²⁶ With respect to third parties, the SEC and the Receiver are entitled to Orders directing the turnover or disgorgement of property.²⁷ Equitable relief from indirect related parties is appropriate regardless of whether a party committed any wrongdoing, simply by showing that the third party has possession of assets of a receivership estate and that there is no legitimate claim to the assets.²⁸ Here, the Receiver is entitled to turnover of the \$10,000.00.

²³ Receiver Declaration ¶ 16.

²⁴ Receiver Declaration ¶ 17 & Exh. 8.

²⁵ Receiver Declaration ¶ 18.

²⁶ See, e.g., *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1103-04 (2nd Cir. 1972).

²⁷ See, e.g., *Hays v. Adams*, 512 F. Supp. 2d 1330 (N.D. Ga. 2007).

²⁸ See, e.g., *SEC v. Colello*, 139 F.3d 674, 679 (9th Cir. 1998); *SEC v. Cherif*, 933 F.2d 403, 414 n.11 (7th Cir. 1991).

The \$10,000.00 must be turned over because it is clearly property of the Receivership Estate inasmuch as Sawtell was making payment on the Innovative/Sawtell loans. The loan proceeds are property of the Receivership Estate. Thus, receipt of the funds was in violation of the Court Orders and must be returned to the Receiver.

The Receiver is *not* arguing at this time that the Firm's receipt of any of the funds was done in knowing violation of the Court Orders. The Receiver, at this point, takes at face value MPM's claims that when it received the funds it relied on Palmer's representations that they were from a defense fund that was not funded with property of the Receivership Estate and MPM did not investigate Palmer's representations.²⁹ But, there can be no dispute that given the facts now known, the \$10,000.00 must be returned to the Receivership Estate. The Firms' persistent refusal to return the funds could now be deemed to be a violation of the Court Orders, and the Receiver reserves the right to seek costs associated with this Motion.³⁰

In refusing to turn over the funds, MPM has argued that there is a factual issue – that notwithstanding the memo on the face of the check designating it as a payment on a loan, that Memmott may have intended the funds to be for Palmer's defense, not payment on the loans, and Palmer thought that the payment was for his defense fund. This argument ignores the memo notation on the check, and Palmer's intent is not relevant – the only issue is whether MPM

²⁹ The Receiver notes, however, that given the Court Orders, MPM's blind reliance on Palmer's representations may be questionable. Also questionable are MPM's representations to the Receiver's counsel that MPM did not investigate the source of the funds in light of MPM's knowledge of asset freeze and the fact that on or about August 15, 2012 MPM obtained a copy of the Sawtell check. *See* Receiver Declaration, Exh. 4 (showing MPM obtained a copy of the check in August 2012).

³⁰ In fact, MPM has challenged the Receiver to bring this Motion given the fact that only \$10,000.00 is at stake. *See* Receiver Declaration, Exh. 7 (Letter dated April 16, 2014, at p. 2); *see also supra* ¶¶ 13-21 (describing all of the opportunities for turnover provided).

received property of the Receivership Estate, which it clearly did – the fact that Palmer may have asserted that the money was for some other purpose does not matter. In fact, even if Palmer testifies that that he told Memmott that the funds would be for a defense fund, Memmott’s transfer of the \$10,000.00 would be in violation of the Receivership Order – thus, making the funds subject to turnover in any event. Specifically, the Receivership Order at ¶ 3 (quoted above in ¶ 5)³¹ expressly states that all assets of the Receivership Estate, such as loan payments, “are frozen” and that “all persons and entities with direct or indirect control over any [such assets] are hereby restrained and enjoined from directly or indirectly transferring or otherwise disposing of or withdrawing such assets.” Thus, even if Memmott applies a portion of his loan payments to a defense fund, the act was in violation of the Receivership Order and the funds must be turned over.

Finally, MPM argues that it never had the right to \$7,000.00 of the funds because the money was in its trust account and it was directed by Palmer to turn it over to PADRM. The Receiver does not have sufficient facts to determine if this is accurate, and therefore, has directed this Motion to both of the Firms.

³¹ See also *supra* ¶ 6 (quoting other provisions of the Receivership Order).

CONCLUSION

For the foregoing reasons, the Receiver requests that this Court grant this Motion, thus ordering that the \$10,000.00 be returned to the Receivership Estate.

DATED this 30th day of May, 2014.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Nathan S. Seim
Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION SEEKING TURNOVER AND MEMORANDUM OF LAW IN SUPPORT** (the "Motion") was filed with the Court on this 30th day of May, 2014, and served via ECF on all parties who have requested notice in this case.

IT IS FURTHER CERTIFIED that on this 30th day of May, 2014, the Motion was emailed to the following:

Brennen Moss
bmossp@padrm.com

/s/ Nathan S. Seim