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Attorneys for Court-Appointed Receiver R. Wayne Klein

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

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

Defendants.

**RENEWED MOTION TO APPROVE
AGREEMENT BETWEEN RECEIVER
AND BARCLAY ASSOCIATES LLC
AND MEMORANDUM IN SUPPORT**

Case No: 2:12-CV-591 BSJ

Judge Bruce S. Jenkins

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 *Renewed Motion to Approve Agreement Between the Receiver and Barclay Associates LLC and Memorandum in*

Support (the “Motion”).¹ The Motion is also supported by the *Declaration of R. Wayne Klein, Receiver* (the “Receiver Declaration”) filed concurrently herewith.

MEMORANDUM OF SUPPORT

I.

SUMMARY

Prior to the Receiver’s appointment, Barclay Associates LLC (“Barclay”) lent \$3.7 million to Riverbend Estates, LC (“Riverbend”), one of the Receivership Entities. Riverbend used the loan proceeds to purchase real property in Middleton, Idaho, defined below as the “Middleton Property.” Barclay’s loan to Riverbend is secured by a recorded Mortgage, Assignment of Rents, and Security Agreement. Riverbend has defaulted on its repayment obligations to Barclay and currently owes over \$5 million to Barclay. The Middleton Property, however, is worth just over \$1 million. Accordingly, it appears that Riverbend owes five times what the Middleton Property is worth. For this reason, the Receiver has entered into an agreement with Barclay, subject to this Court’s approval, to convey, without warranty, any interest the Receivership Estate has in the Middleton Property to Barclay. A copy of the proposed agreement is attached as **Exhibit G** to the Receiver Declaration. In exchange, Barclay waives its claims against the Receivership Estate, including any claim for a deficiency judgment between the \$1 million dollar value of the Property and the over \$5 million that Riverbend owes. This Motion asks the Court to approve this agreement between Riverbend and Barclay.

¹ A Motion to Approve Agreement between Receiver and Barclay Associates LLC and Memorandum in Support was originally filed on April 24, 2013 [Docket No. 278]. A hearing on the Motion was held on June 7, 2013, at which time the Court requested that the Receiver provide it with further information about the basis for the Agreement in question, as well as to clarify that the Receiver was “conveying” the property in question, not abandoning it.

II.

RELIEF SOUGHT

The Receiver seeks an order from the Court (1) authorizing the Receiver to immediately convey, without any warranties, all of the interest of the Receivership Estate in real property located in Middleton, Idaho, legal descriptions for which are set forth below, (2) lifting the Court's asset freeze, and (3) approving the terms of the parties' agreement.

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").²

2. Pursuant to the Receivership Order, the Receiver was appointed, and NNU, forty-one of its affiliated companies (the "Palmer Entities"), including Riverbend, and all Palmer's assets were placed in the Receiver's control.³

3. The Court has directed and authorized the Receiver to, among other things, 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 . . . [.]"⁴

² Docket No. 9 (Receivership Order).

³ See generally, *id.*

⁴ *Id.* at ¶ 7(A).

- “To take custody, control and possession of all Receivership Property and records . . . [.]”⁵
- 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;⁶
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities”⁷
- “[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.⁸
- “[T]ransfer clear title to[] all real property in the Receivership Estates” upon order of the Court.⁹

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 Middleton Property described in detail below.¹⁰

The Middleton Property and Barclay’s Secured Interests

5. On or about May 31, 2007, Barclay lent \$3,700,000 to Riverbend pursuant to a Promissory Note, a copy of which is attached to the Receiver Declaration as **Exhibit A** (the “First Barclay Loan”).¹¹ Riverbend used the loan proceeds towards the purchase of real property

⁵ *Id.* at ¶ 7(B).

⁶ *Id.* at ¶ 7(C).

⁷ *Id.* at ¶ 19.

⁸ *Id.* at ¶ 37.

⁹ *Id.* at ¶ 39.

¹⁰ *Id.* ¶¶ 3, 29, 32-34.

¹¹ Receivership Declaration at ¶ 4.

in Middleton, Idaho.¹²

6. On or about May 31, 2007, Riverbend signed a Mortgage, Assignment of Rents, and Security Agreement (the “Barclay Mortgage”), pursuant to which the Barclay Loan was secured by real property in Middleton, Idaho.¹³ A copy of the Barclay Mortgage is attached as **Exhibit B** to the Receiver Declaration. The real property that was the subject of the Barclay Mortgage consists of approximately 171.73 acres (the “Main Property”), and is described as follows:

Lots 4, 5 and 7, and the Southeast quarter of the Northwest quarter of Section 7, Township 4 North, Range 2 West of the Boise Meridian, Canyon County, Idaho.

AND Lot 1 of section 12, Township 4, North, Range 3 West of the Boise Meridian, Canyon County, Idaho.

Excepted therefrom all of that part of the Southeast quarter of the Northwest quarter of Section 7, Township 4 North, Range 2 West of the Boise Meridian, lying South and East of the South bank of the Middleton Mill Slough, and the right-of-way acquired by Drainage District No. 2 of the County of Canyon, State of Idaho.¹⁴

7. A separate, but adjoining piece, of property was acquired by National Note on June 18, 2007 (the “First Adjoining Property”).¹⁵ The legal description of this property is:

A portion of Government Lot 3 of Section 7, Township 4 North, Range 2 West, Boise Meridian, Canyon Country, Idaho, more particularly describes as follows:

Commencing at the Northwest corner of Government Lot 3, from which the Northwest corner of Government Lot 4 of said Section 7 bears North 89° 44’ 28” West 1251.18 feet’ thence along West boundary of said Government Lot 3

South 01° 42’ 06” West 111.29 feet to a 5/8” diameter rebar with an aluminum cap monument, witnessing the Northwest corner of said Government Lot 3, said point being the POINT OF BEGINNING; thence leaving said West boundary

¹² *Id.* The Receiver has learned that Barclay did not obtain an appraisal in 2007. Instead, Barclay has explained to the Receiver that based on its review of the business plan provided by Wayne Palmer in 2007, its knowledge of the real estate market at the time, its understanding that National Note had paid \$10 million for the property (making the Barclay loan equal to 37% of the purchase price of the property), and its own, independent due diligence, it considered the loan in 2007 to be safe and fully secured. *See* Receiver Declaration at n. 1.

¹³ *Id.* at ¶ 5.

¹⁴ *Id.* at Exhibit B.

¹⁵ *Id.* at ¶ 6.

North 51° 46' 15" East 52.16 feet to a point on the proposed Westerly boundary of Middleton Lakes Estates Subdivision No. 4; thence along said proposed boundary, 40 feet East of and parallel with the West boundary of Said Government Lot 3;

South 01° 42' 06" West 1548.03 feet; thence leaving said proposed boundary

North 89° 14' 35" West 40.01 feet to a point on the West boundary of said Government Lot 3; thence along said West boundary

North 01° 42' 06" East 1515.20 feet to the POINT OF BEGINNING.¹⁶

8. Subsequently, National Note borrowed an additional \$77,000.00 from Barclay (the "Second Barclay Loan"), and in exchange National Note transferred an Assignment of Beneficial Interest in Trust Deed and an assignment of the related Promissory Note to Barclay (the "Barclay ABI").¹⁷ A copy of the Barclay ABI is attached to the Receiver Declaration as **Exhibit C**.

9. National Note acquired another adjoining piece of property (the "Second Adjoining Property").¹⁸ This property is .05 acres. It is a strip of land approximately two feet wide that runs along the west side of the Main Property. The legal description is:

07-4N-2W NW Sandra Corn Sloviacz Tax 1 of Lots 1 through 11 Blk 1 Gabica Road to Farm

10. The Main Property, the First Adjoining Property, and the Second Adjoining Property are collectively known as the "Middleton Property". The Middleton Property is currently identified by the following tax parcel numbers: 339090000; 339090100; 339090110; 33900012B0; 185370000; 339100000; 347520000.¹⁹

The Current Value of the Middleton Property and Amounts Owed to Barclay

11. An appraisal of the Main Property was completed on September 24, 2012, by Jess

¹⁶ *Id.* at Exhibit C.

¹⁷ *Id.* at ¶ 7.

¹⁸ *Id.* at ¶ 8.

¹⁹ *Id.* at ¶ 9.

Payne Appraisal Service.²⁰ According to this September 24, 2012 appraisal, the value of the Main Property is \$1,000,000. A copy of the September 24, 2012 appraisal is attached to the Receiver Declaration as **Exhibit D**.

12. The September 24, 2012 appraisal was updated on March 26, 2013 to account for the value of the First Adjoining Property. According to this update, the value of the First Adjoining Property is \$8,500.²¹ A copy of the update to the September 24, 2012 appraisal is attached to the Receiver Declaration as **Exhibit E**.²²

13. The tax value of the Second Adjoining Property is zero.²³

14. Accordingly, based on information obtained by the Receiver from independent sources, it appears that the current value of the Middleton Property is \$1,008,500.²⁴

The Receiver's Reliance on the Appraisal

15. The appraisal of the Middleton Property discussed above was paid for by Barclay, not the Receiver and the Receiver has used the values in the appraisal to determine that the

²⁰ *Id.* at ¶ 11.

²¹ *Id.* at ¶ 12.

²² The First Adjoining Property is not security for the \$3.7 million loan from Barclay. However, given the low value of this property to anyone except a contiguous land owner, such as Barclay, and the expense associated with marketing, selling, and acquiring court approval of any sale, the Receiver has determined that the most efficient use of the First Adjoining Property is to convey, without any warranties, the Receivership Estate's interest in this property to Barclay, as set forth in the Agreement, in exchange for the significant benefits to the Receivership Estate of the settlement with Barclay. *Id.* at ¶ 16.

²³ *Id.* at ¶ 13. Barclay is not secured by the Second Adjoining Property. This property has no value. It is a two-foot wide strip of land that is undevelopable, by itself, and has no value, according to the county records. Conveyance, without any warranties, of the Receivership Estate's interest in this property to Barclay as part of the settlement agreement, relieves the Receivership of managing and marketing this essentially worthless strip of land. *Id.* at ¶ 17.

²⁴ The Receiver reviewed a title report on the property to determine if any third-parties have claims or interests in the Middleton Property. The Middleton Property is subject to various easements, rights of way, and a mineral lease, all of which will pass with the land to Barclay. However, other than Barclay's secured interest in the property and an insider deed of trust between two Receivership entities, there are no other security interests recorded against the Middleton Property.

proposed agreement is in the best interest of the Receivership Estate.²⁵

16. It is respectfully submitted that the fact that Barclays, and not the Receivership Estate has paid for the appraisal, has no effect on the conclusions set forth in the appraisal, and given the standards that apply to licensed appraisers, it is reasonable for the Receiver to rely on the appraisal paid for by Barclay in entering into the agreement at issue.

17. The appraiser is a certified, licensed general appraiser.²⁶ He is a member of the Appraisal Institute, which requires its members to adhere to a Code of Professional Ethics and Standard of Professional Practice.²⁷ The Code of Professional Ethics expressly provides that it is unethical to prepare a biased opinion or an appraisal that is contingent upon reporting a predetermined opinion or conclusion.²⁸

18. The appraiser certified that his appraisal report contains his “personal, impartial, and unbiased professional analysis, opinion and conclusion.”²⁹ He further certified that he has “no present or prospective interest in the property . . . and no personal interest with respect to the parties involved.” He certified that his “engagement . . . was not contingent upon developing or reporting predetermined results,” nor was his “compensation for completing this assignment contingent upon the development or reporting of a predetermined value or direction in value that favors” Barclay.³⁰

19. Moreover, by letter to the Receiver dated June 3, 2012, a copy of which is

²⁵ Receiver Declaration ¶ 14.

²⁶ *Id.* at Exhibit E, p. 19.

²⁷ *Id.*

²⁸ *See* Code of Professional Ethics, Ethical Rules 3.1 and 3.3.

²⁹ *See* Receiver Declaration, at Exhibit E, p. 19.

³⁰ *Id.*

attached to the Receiver Declaration as **Exhibit F**, the appraiser stated that his appraisal “would contain the same value regardless of the client”³¹ The appraiser explained that “market alone dictates values. Appraisers analyze and interpret the indicators but do not create value.”³²

20. The appraiser further explained in his letter that the lower value of the Middleton Property in 2013, as compared to past years, is that in past years there were sales of properties such as the Middleton Property “that investors were speculating on [But,] [t]he last few years has seen little speculative development land being purchased, and the highest prices now is for farmland.”³³ In other words, the Receiver believes that the significant changes in the real estate market from 2007 to 2013 have negatively affected the value of the Middleton Property.

Riverbend Is In Default

21. According to the records held by the Receiver, Riverbend has not repaid Barclay the \$3,700,000 owed pursuant to the First Barclay Loan.³⁴ With late fees and interest, it is believed that Riverbend currently owes Barclay over \$5.1 million - or \$4.1 million more than the Middleton Property is worth.³⁵ In addition, National Note has not repaid the \$77,000 Second Barclay Loan.³⁶

Proposed Agreement

22. Based on the facts set forth above, the Receiver has determined that the Middleton

³¹ See Receiver Declaration, at Exhibit F.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at ¶ 15.

³⁵ *Id.*

³⁶ *Id.*

Property is burdensome to the Receivership Estate.³⁷

23. The Receiver and Barclay have entered into good faith and arm's length negotiations,³⁸ and have entered into the agreement attached to the Receiver Declaration as **Exhibit G** (the "Agreement"), subject to approval of this Court. This is the Agreement for which the Receiver seeks approval.

24. The key points of the Agreement are as follows:

- a. The Receiver agrees to convey, without any warranties, the Receivership Estate's interest in the Middleton Property to Barclay.
- b. Barclay agrees to waive any and all claims that it might have related to the Barclay Loan and the Second Barclay Loan as against the Receiver and/or the Receivership Estate, and it agrees that it will receive no distribution from the Receivership Estate.
- c. The Receiver and Barclay agree to mutually release each other, their owners, employees, officers, directors, agents, servants and affiliates, and in the case of Barclay, 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 referenced herein.³⁹

IV.

ARGUMENT

The Receiver requests that the Court enter an Order granting this Motion (a) authorizing the Receiver to convey, without any warranties, the Receivership's interest in the Middleton Property to Barclay, (b) lifting the asset freeze imposed by the Receivership Order, and (c) approving the terms of the Agreement set forth above. For the reasons set forth below, the Court has the discretion to grant the requested relief, and given the facts, such relief is appropriate.

³⁷ *Id.* at ¶ 18.

³⁸ *Id.*

³⁹ Although not a part of the written Agreement, Barclay has also agreed to pay \$2,500 towards the legal fees incurred in bringing this Motion.

First, this Court has broad equitable discretion to permit the Receiver to convey or transfer the property of the Receivership Estate and to approve agreements related to property of the Receivership Estate.⁴⁰ Here, the Receiver has conducted an investigation of the Middleton Property and the interests of Barclay in that Property, and determined that Barclay's interests in the Middleton Property are valid and perfected.⁴¹ Moreover, there does not appear to be equity in the Middleton Property that would benefit the Receivership Estate. To the contrary, Barclay is owed approximately \$4.1 million more than the property is worth. Thus, the Receiver has determined that it is in the best interests of the Receivership Estate to convey, without any warranties, any interest that the Estate has in the Middleton Property to Barclay and to enter into the Agreement set forth above.⁴² The Agreement has the additional benefit of obtaining a release and waiver of claims by Barclay, including a release of any claim to any deficiency between the value of the property and the approximately \$5.1 million that is owed to Barclay.⁴³

Second, the Court has the power to lift its freeze of assets.⁴⁴ In determining whether a stay should be lifted, the Court considers four factors set out in *Securities & Exchange*

⁴⁰ See *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (“[T]he district court has broad powers and wide discretion to determine . . . relief in an equity receivership.”); 65 Am. Jur. 2d RECEIVERS § 156 (2012) (“If a receiver determines that a particular asset has so little value as to make its administration unprofitable, the receiver may petition the court for an instruction to abandon the asset as worthless”); cf. 11 U.S.C. § 554(a) (trustee in bankruptcy may abandon property of the estate that is burdensome or that is of inconsequential value and benefit to the estate).

⁴¹ As explained above, in footnotes 22 and 23, the value of these properties renders their continued administration unprofitable for the Receivership. See 65 Am. Jur. 2d RECEIVERS § 156 (2012) (“If a receiver determines that a particular asset has so little value as to make its administration unprofitable, the receiver may petition the court for an instruction to abandon the asset as worthless”); cf. 11 U.S.C. § 554(a) (trustee in bankruptcy may abandon property of the estate that is burdensome or that is of inconsequential value and benefit to the estate).

⁴² *Id.* at ¶ 19.

⁴³ *Id.* at ¶¶ 18 and 19.

⁴⁴ 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).

Commission v. Wencke:⁴⁵ (1) if Barclay 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 Barclay's interest in the Middleton Property has merit; and (4) the interests of the parties. Here, each of these factors has been met. Barclay will suffer substantial injury if it is not permitted to proceed because the Barclay First and Second Loans have been in default and Barclay has not been able to proceed against its collateral as a result of this case. Second, the Receiver has had sufficient time to investigate the Middleton Property and Barclay's interest therein. Third, Barclay has a valid security interest in the Main Property. Fourth, the Receiver has determined from his investigation that there is no equity in the Middleton Property that would benefit the Receivership Estate. To the contrary, Barclay is owed over \$4 million more than the Middleton Property is worth.

V.

CONCLUSION

For all of the reasons stated herein and as supported by the Receiver Declaration, the Receiver requests that the Court grant the Motion, thus authorizing the Receiver's conveyance, without any warranties, of any interest that the Receivership Estate may have in the Middleton Property, lifting the Court's asset freeze, and approving the Agreement set forth herein.

RESPECTFULLY SUBMITTED this 13th day of June, 2013.

DORSEY & WHITNEY LLP

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

⁴⁵ 742 F.2d 1230, 1231 (9th Cir. 1984); *see Vescor*, 599 F.3d at 1196.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RENEWED MOTION TO APPROVE AGREEMENT BETWEEN RECEIVER AND BARCLAY ASSOCIATES LLC AND MEMORANDUM IN SUPPORT** was filed with the Court on this 13th day of June, 2013, and served via ECF on all parties who have requested notice in this case.

/s/ Heidi Daniels
Heidi Daniels

Furthermore, I certify that on the 13th day of June, 2013, the **RENEWED MOTION TO APPROVE AGREEMENT BETWEEN RECEIVER AND BARCLAY ASSOCIATES LLC AND MEMORANDUM IN SUPPORT** was served on the following parties by U.S. Mail postage prepaid:

Steve Zimmerman
Barclay Associates, LLC/President
999 Fifth Ave.
Suite 250
San Rafael, CA 94901

/s/ Heidi Daniels
Heidi Daniels