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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.

**RECEIVER’S MOTION TO APPROVE
AGREEMENT BETWEEN RECEIVER
AND WGTS, LTD., 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 *Motion to Approve Agreement Between the Receiver and WGTS, Ltd., 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

In June 2011, prior to the Receiver's appointment, WGTS, Ltd. ("WGTS") loaned \$110,000.00 to Expressway Business Park, LLC ("Expressway"), one of the "Palmer Entities" (defined below) that is part of the Receivership Estate. Based on certain documents discussed in further detail below, Expressway agreed to repay this money and the obligation was secured by certain real property located in Spanish Fork, Utah that is property of the Receivership Estate. At this time, it appears that the debt is in default and there is no equity in the real property for the benefit of the Receivership Estate. The Receiver has entered into an agreement with WGTS, subject to this Court's approval, to convey, without warranty, any interest the Receivership Estate has in the real property to WGTS. A copy of the proposed agreement is attached as Exhibit D to the Receiver Declaration. In exchange, WGTS waives its claims against the Receivership Estate, including any claim for a deficiency judgment between the value of the real property and the amount that Expressway owes. This Motion asks the Court to approve this agreement between the Receiver and WGTS.

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 Spanish Fork, Utah, the legal description of which is set forth below, (2) lifting the Court's asset freeze applicable in this case, and (3) approving the terms of the parties' proposed 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”).¹

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

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 . . . [.]”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 possession, custody and control all Receivership Property pending further Order of this Court;⁵
- “[T]o take immediate possession of all real property of the Receivership Defendants and

¹ Docket No. 9 (Receivership Order).

² *See generally, id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

⁵ *Id.* at ¶ 7(C).

the Palmer Entities”⁶

- “[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.⁷
- “[T]ransfer clear title to[] all real property in the Receivership Estates” upon order of the Court.⁸

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 Property described in detail below.⁹

The Property and WGTS’s Secured Interest

5. On or about June 27, 2011, WGTS loaned \$110,000.00 to NNU pursuant to a promissory note (the “WGTS Loan”), a copy of which is attached to the Receiver Declaration as Exhibit A.¹⁰

6. On or about June 27, 2011, Expressway as borrower and trustor and WGTS as lender and beneficiary executed a Deed of Trust, which was recorded on June 27, 2011 by the Utah County Recorder’s Office as Entry No. 46672:2011 (the “Deed of Trust”), a copy of which is attached to the Receiver Declaration as Exhibit B.¹¹

7. Pursuant to the Deed of Trust, the WGTS Loan was secured by a parcel of real

⁶ *Id.* at ¶ 19.

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 39.

⁹ *Id.* ¶¶ 3, 29, 32-34.

¹⁰ Receiver Declaration at ¶ 4.

¹¹ *Id.* at ¶ 5.

property in Spanish Fork, Utah as described in the Deed of Trust (the “Property”).¹²

Lack of Equity in Property

The Appraisal

8. An appraisal of the Property was completed on May 24, 2013 for WGTS, by John Limpert, Certified General Appraiser at Van Drimmelen & Associates, Inc. (the “Appraisal”), a copy of which is attached to the Receiver Declaration as Exhibit C.¹³

9. The appraiser who conducted the Appraisal is a certified, licensed general appraiser.¹⁴ 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.¹⁵ 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.¹⁶

10. The appraiser certified in the Appraisal that he has “no present or prospective interest in the property appraised . . . and no personal interest with respect to the parties involved.”¹⁷ He further certified in the Appraisal that his engagement “was not contingent upon developing or reporting predetermined results.”¹⁸ The appraiser also certified in the Appraisal that his “compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors” WGTS.¹⁹

¹² *Id.* at ¶ 6, Exhibit B.

¹³ *Id.* at ¶ 7, Exhibit C.

¹⁴ *Id.* at Exhibit C, p. xxiii.

¹⁵ *Id.* at Exhibit C, p. viii.

¹⁶ *See* Code of Professional Ethics, Ethical Rules 3.1 and 3.3.

¹⁷ *See* Receiver Declaration, at Exhibit C, p. viii.

¹⁸ *See Id.*

¹⁹ *Id.*

11. According to the Appraisal, the value of the Property is \$105,000.00.²⁰

The Receiver's Reliance on the Appraisal and Lack of Equity

12. The Receiver, in an exercise of his reasonable business judgment and based on the standards governing and certifications made by the appraiser in the Appraisal, the Receiver has relied on the valuation of the Property in the Appraisal in determining that the proposed agreement is in the best interest of the Receivership Estate.²¹

13. The Receiver has been on site at the Property, and believes that the value of \$105,000.00 set forth in the Appraisal may be optimistic given the price per square foot attributed to nearby finished units at the Property that are also property of the Receivership Estate. To date, the Receiver has analyzed appraisals for two larger finished units at the Property from the same appraiser – Units ## 109 and 215 (an appraisal has also been obtained for Unit #305, but it is unfinished and thus not a comparable property). The Receiver ordered one of these appraisals and a lender ordered the other. Based on the values attributed to Units ## 109 and 215, the average price per square foot is \$57.36. Applying that price to Unit #204, which has 1,612 square feet and .037 in acreage, the value of Unit #204 could be as low as \$92,448.26.²²

14. According to the records of the Receivership Estate in the Receiver's custody, Expressway has not repaid WGTS the \$110,000.00 owed pursuant to the WGTS Loan.²³ Based on the WGTS Loan documents, the Receiver believes that Expressway currently owes WGTS

²⁰ *Id.* at ¶ 8, Exhibit C, p. vi.

²¹ Receiver Declaration at ¶ 9.

²² *Id.* at ¶ 10.

²³ *Id.* at ¶ 11.

over \$131,000.00.²⁴

15. Based on the value of the Property set forth in the Appraisal and the appraised values of similar properties, and taking into account amounts owed to WGTS and potential costs of sale, the Receiver has determined that there is no equity in the Property for the benefit of the Receivership Estate.²⁵

Proposed Agreement

16. Based on the facts set forth above, the Receiver has determined that the Property is burdensome to the Receivership Estate.²⁶

17. The Receiver and WGTS have entered into good faith and arm's length negotiations,²⁷ and have entered into the agreement attached to the Receiver Declaration as Exhibit D (the "Agreement"), subject to approval of this Court. This is the Agreement for which the Receiver seeks approval.

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

- The Receiver agrees to convey, without any warranties, the Receivership Estate's interest in the Property to WGTS subject to the occupancy rights of the existing tenant, with rents from the existing tenant being due to WGTS.
- WGTS agrees to waive any and all claims that it might have related to the WGTS Loan as against the Receiver and/or the Receivership Estate, and it agrees that it will receive no distribution from the Receivership Estate.
- WGTS further represents that neither it nor its members or managers are insiders of NNU or any Palmer Entity.

²⁴ *Id.*

²⁵ *Id.* at ¶ 12.

²⁶ *Id.* at ¶ 13.

²⁷ *Id.* at ¶ 14.

- The Receiver and WGTS agree to mutually release each other, their owners, employees, officers, directors, agents, servants and affiliates, and in the case of WGTS, 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 in the Agreement.²⁸

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 Property to WGTS, (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.

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.²⁹ Here, the Receiver has conducted an investigation of the Property and the interests of WGTS in that Property, and determined that WGTS's interests in the Property are valid and perfected.³⁰ Moreover, taking into account the appraised value of the Property and the

²⁸ *Id.* at Exhibit D.

²⁹ *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).

³⁰ As explained above, the value of the Property renders its 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).

potential costs of sale, there does not appear to be equity in the Property that would benefit the Receivership Estate. 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 Receivership Estate has in the Property to WGTS and to enter into the Agreement set forth above.³¹ The Agreement has the additional benefit of obtaining a release and waiver of claims by WGTS, including a release of any claim to any deficiency between the value of the Property and the approximately \$131,000.00 that is owed to WGTS. In addition, under the Agreement, WGTS will pay all outstanding property taxes and any closing costs and transfer fees.³²

Second, the Court has the power to lift its freeze of assets.³³ In determining whether a stay should be lifted, the Court considers four factors set out in *Securities & Exchange Commission v. Wencke*:³⁴ (1) if WGTS 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 WGTS's interest in the Property has merit; and (4) the interests of the parties. Here, each of these factors has been met.

It appears that WGTS will suffer substantial injury if it is not permitted to proceed because the WGTS Loan is in default and WGTS has 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 WGTS's interest therein.³⁵ Third, WGTS has a valid security interest in the Property.³⁶

³¹ Receiver Declaration at ¶ 15.

³² *Id.* at ¶ 16 and Exhibit D.

³³ *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).

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

³⁵ *See* Receiver Declaration at ¶ 3.

Fourth, the Receiver has determined from his investigation that, given the appraised value of the Property, the amount owed to WGTS and costs of any sale of the Property, there is no equity in the Property that would benefit the Receivership Estate.³⁷

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 Property, lifting the Court's asset freeze, and approving the Agreement set forth herein.

RESPECTFULLY SUBMITTED this 8th day of July, 2013.

DORSEY & WHITNEY LLP

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

³⁶ *Id.* at Exhibit B.

³⁷ *Id.* ¶ 12.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION TO APPROVE AGREEMENT BETWEEN RECEIVER AND WGTS, LTD., AND MEMORANDUM IN SUPPORT** (the "Motion") was filed with the Court on this 8th day of July, 2013, and served via ECF on all parties who have requested notice in this case.

/s/ Candy Long
Candy Long

Furthermore, I certify that on the 8th day of July, 2013, the Motion was served on the following parties by U.S. Mail postage prepaid:

Tom Cook
Lundberg & Associates
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115

Z&K Enterprises
1006 N. 1100 East
Spanish Fork, Utah 84660

/s/ Candy Long
Candy Long