

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 THIRD MOTION AND
MEMORANDUM IN SUPPORT
REQUESTING ORDER APPROVING
SETTLEMENT AGREEMENTS**

**(Chis Dunford; Darrell D. Woodward
Trust; Northpointe Insurance; Peggy
Baird; Kwangsun Sarah Choe and
William Grohs; Shirlene Graham and
Clinton Godfrey; Estate of Phyllis
Hansen; Jenniffer Welliver; David
Wahl; and Quansheng Dong, Connie
Dong, and Xiaoping Su)**

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

¹ Docket No. 9 (Receivership Order).

² See generally, *id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

- “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
- “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 ten Settlement Agreements and Releases with certain parties (the

⁵ *Id.* at ¶ 7(C).

⁶ *Id.* at ¶ 7(D).

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 7(J).

⁹ Receiver Declaration ¶ 3.

“Settlement Agreements”).¹⁰ Each 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. Chris Dunford. On May 20, 2013, the Receiver entered into a Settlement Agreement and Release with Chris Dunford (“Dunford”), an NNU investor who was paid \$20,244.92 in excess of the amounts he invested. Under the Settlement Agreement, Dunford has paid \$18,000.00 to the Receivership Estate. Dunford provided verified information regarding his financial condition and chronic medical conditions that render him unable to repay the amounts demanded. In order to make the payment required by the settlement, Dunford withdrew funds from a retirement account that otherwise would have been exempt from seizure by the Receiver in litigation.¹²

b. Woodward Trust: On May 31, 2013, the Receiver entered into a Settlement Agreement and Release with the Darrell D. Woodward Trust (“Woodward”). The Receiver asserts that Woodward received \$40,716.41 in overpayments on its NNU investment. Under the Settlement Agreement, Woodward has repaid the full amount of the overpayment.¹³

¹⁰Receiver Declaration ¶ 4.

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

¹³ Receiver Declaration ¶ 7.

c. Northpointe Insurance: On June 4, 2013, the Receiver entered into a Settlement Agreement and Release with Northpointe Insurance (“Northpointe”). The Receiver asserts that Northpointe received \$9,525.10 in overpayments on its investment. Under the Settlement Agreement, Northpointe will repay the full overpayment to the Receiver for the benefit of the Receivership Estate by December 31, 2013. \$4,025.10 of the full overpayment has already been paid by Northpointe.¹⁴

d. Baird: On June 5, 2013, the Receiver entered into a Settlement Agreement and Release with Peggy Baird (“Baird”), an NNU investor who received \$17,423.91 in overpayments on her investments and \$7,924.38 in commissions. Baird provided verified financial information, including tax returns, to the Receiver demonstrating that she lacks the ability to repay any amount to the Receiver based on losses suffered in the forced sale of her home and low income.¹⁵

e. Choe and Grohs. On June 6, 2013, the Receiver entered into a Settlement Agreement with Kwangsun Sarah Choe (“Choe”) and William Grohs (“Grohs”). Choe and Grohs are married and had four investment accounts with National Note. Three of the investment accounts had net gains and one had net losses. The losses in the single account were greater than the gains in the three accounts with net winnings. Choe and Grohs provided information to the Receiver that common funds were used for investments in the four accounts. Under the Settlement Agreement, the losses will be offset against gains and Choe and Grohs agree to waive all claims they might make against recoveries of the Receivership Estate.¹⁶

¹⁴ Receiver Declaration ¶ 8.

¹⁵ Receiver Declaration ¶ 9.

¹⁶ Receiver Declaration ¶ 10.

f. Graham and Godfrey. On June 17, 2013, the Receiver entered into a Settlement Agreement and Release with Shirlene Graham (“Graham”) and her son, Clinton Godfrey (“Godfrey”), NNU investors who received \$13,617.17 in overpayments on their investments. Pursuant to the Settlement Agreement, Graham has repaid \$9,000.00 to the Receiver. Graham provided verified financial information to the Receiver demonstrating that she lacks the income and liquid assets to repay the full amount of the overpayments to the Receiver.¹⁷

g. Hansen: On June 21, 2013, the Receiver entered into a Settlement Agreement and Release with the Estate of Phyllis Hansen (“Hansen”). The Receiver asserts that Hansen received \$70,000.00 in overpayments on her investment. Hansen provided information showing that distributions of the proceeds from the Hansen estate went to beneficiaries who lack the financial capacity to return those funds to the Receiver. Under the Settlement Agreement, beneficiaries of Hansen have paid \$55,000.00 to the Receiver for the benefit of the Receivership Estate.¹⁸

h. Welliver: The Receiver filed a lawsuit against Jenniffer Welliver (“Welliver”) on June 17, 2013, in a case captioned *Klein v. Welliver*, Case No. 2:13-cv-460-PMW (D. Utah). On June 21, 2013, the Receiver entered into a Settlement Agreement and Release with Welliver. The Receiver asserts that Welliver received \$12,743.15 in overpayments on her investment. Welliver provided verified financial information to the Receiver demonstrating that she is over 65 years of age, lost a home to foreclosure, and had her employment terminated. The funds being paid under the settlement will come from Welliver’s retirement savings. Under the Settlement Agreement, Welliver will repay \$8,000.00 to the Receiver for the benefit of the

¹⁷ Receiver Declaration ¶ 11.

¹⁸ Receiver Declaration ¶ 12.

Receivership Estate by December 31, 2013. Welliver has already paid \$4,000.00 of the settlement amount. Upon payment of the balance of the settlement amount, the Receiver will dismiss the lawsuit against Welliver.¹⁹

i. Wahl: On June 26, 2013, the Receiver entered into a Settlement Agreement and Release with David C. Wahl (“Wahl”). The Receiver asserts that Wahl received \$6,039.04 in overpayments on his investment. Under the Agreement, Wahl will repay the full overpayment to the Receiver for the benefit of the Receivership Estate by December 31, 2013, with a portion to be paid each quarter beginning on June 30, 2013.²⁰

j. Dong: On July 2, 2013, the Receiver entered into a Settlement Agreement and Release with Quansheng Dong (“Quansheng”), Xiaoping Su (“Su”), and Connie Dong (“Connie” and together with Quansheng and Su, “Dong”). The Receiver asserts that Connie received \$1,977.64 in overpayments on her investment and that Quansheng received \$14,240.34 in overpayments on his investment. Dong has provided information to the Receiver demonstrating that Su is a family member who invested \$20,000.00 with NNU, but received no return on her investment. Dong has also provided financial information to the Receiver demonstrating financial difficulties faced by the family and their inability to repay the overpayments. Under the Settlement Agreement, the loss suffered by Su will be offset against the gains received by Quansheng and Connie and Dong agrees to waive all claims they might make against recoveries of the Receivership Estate.²¹

¹⁹ Receiver Declaration ¶ 13.

²⁰ Receiver Declaration ¶ 14.

²¹ Receiver Declaration ¶ 15.

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.” *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)).

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.” *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). 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.

Id.

9. Here, each of the Settlement Agreements 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 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.²²

10. In the case of the Settlement Agreements with the Woodward Trust, Northpointe Insurance, and Wahl, the Receivership Estate will obtain full recovery of overpaid funds either in lump sum or over time.²³

11. In the case of the Settlement Agreements with Dunford, Graham, Hansen Estate, and Welliver, the Receivership Estate will receive compromised sums of the overpayments that is as much as reasonably can be expected in light of the financial condition of those agreeing to make payments. In fact, in the cases of three of these persons, the Receiver will be paid from funds that might be exempt from execution in the event he won a judgment against the overpaid investors. In the fourth case, the funds are coming from estate beneficiaries which were not the recipients of funds from National Note. Based on the Receiver's analysis of the financial condition of these persons, he has determined in his business judgment that the amounts to be paid to the Receivership Estate under the Settlement Agreements and Releases are as much as can be expected and are fair, reasonable and adequate.²⁴

12. In the case of the Settlement Agreements with Choe and Grohs, and Dong, the Receivership Estate will receive a full release of claims and actions that these parties might have against the Receivership Estate. Based on the Receiver's analysis of the potential adverse

²² Receiver Declaration ¶ 16.

²³ Receiver Declaration ¶ 17.

²⁴ Receiver Declaration ¶ 18.

claims, he believes Choe and Grohs could assert claims for an amount greater than the amount of the overpayments to Choe and Grohs. Similarly, the Receiver believes Su could assert a claim for an amount greater than the amount of the overpayments to Quansheng and Connie. The Receiver has determined in his business judgment that reduction in the amount that can be claimed by Choe, Grohs, and Su is fair, reasonable, and adequate in light of the amount of overpayment to other accounts held by Choe, Grohs, and Dong.²⁵

13. In the case of the Settlement Agreement and Release with Baird, the Receiver has determined, after analyzing her verified financial information that he would be unlikely to recover any amount on a judgment he would obtain against her. Accordingly, any funds spent pursuing litigation against her would be unlikely to result in a net recovery. Therefore, further investigation and litigation efforts should be minimized.²⁶

14. Together, these Settlement Agreements will result in the payment of over \$146,000.00 to the Receivership Estate.²⁷

15. Each of the Settlement Agreements was negotiated fairly and honestly, and is the result of an arm's length transaction. There has been no collusion between the parties.²⁸

16. In light of these factors, the Receiver believes these Settlement Agreements are just and fair and should be approved.

²⁵ Receiver Declaration ¶ 19.

²⁶ Receiver Declaration ¶ 20.

²⁷ Receiver Declaration ¶ 21.

²⁸ Receiver Declaration ¶ 22.

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 described above.

DATED this 8th day of July, 2013.

DORSEY & WHITNEY LLP

/s/ Jeffrey M. Armington

Peggy Hunt

Chris Martinez

Jeffrey M. Armington

Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S THIRD MOTION AND MEMORANDUM IN SUPPORT REQUESTING ORDER APPROVING SETTLEMENT AGREEMENTS (Chis Dunford; Darrell D. Woodward Trust; Northpointe Insurance; Peggy Baird; Kwangsun Sarah Choe and William Grohs; Shirlene Graham and Clinton Godfrey; Estate of Phyllis Hansen; Jenniffer Welliver; David Wahl; and Quansheng Dong, Connie Dong, and Xiaoping Su)** (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/ Jeffrey M. Armington

Furthermore, I certify that on the 8th day of July, 2013, the Motion was served on the following parties by electronic mail:

Chris Dunford
8170 Rogue River Highway
Grants Pass, OR 97527
Chris244@netzero.com

Darrell D. Woodward Trust
c/o Daniel Anderson, Esq.
Anderson & Anderson
PO Box 275
Monticello, UT 84535-0275
daniel@aotitle.com

Northpointe Insurance Corp.
561 East Spruce Glen Drive
Murray, UT 84107
Northpointe_ins@comcast.net

Peggy Baird
c/o Drew Briney, Esq.
734 North Main Street
Spanish Fork, UT 8460
drew@drewbriney.com

Sarah Choe and William Grohs
1230 Bramling Cross Drive
Sparks, NV 89441
billgrohs@yahoo.com

Shirlene Graham and Clinton Godfrey
c/o A. O. Headman, Jr., Esq.
Cohne Rappaport & Segal
257 East 200 South, Suite 700
Salt Lake City, UT 84111
aoh@crslaw.com

Estate of Phyllis Hansen
c/o Richard Davis, Esq.
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
trdavis@cnmlaw.com

Jennifer Welliver
c/o Roya Deyhim, Esq.
Law Office of Roya Deyhim, LLC
411 Huku Li'i Place, Suite 201
Kihei, Hawaii 96753
roya@maitrusts.com

David C. Wahl
PO Box 8012
Mammoth Lakes, CA 93546
buckwahl@verizon.net

Quansheng Dong, Connie Dong, and Xiaoping Su
43763 Carrleigh Court
Ashburn, VA 20147
cow1819@gmail.com

/s/ Jeffrey M. Armington