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Attorneys for Court-Appointed Receiver R. Wayne Klein

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

<p>R. WAYNE KLEIN, as Receiver, Plaintiff, v. REED LARSEN, SUPERIOR PROPERTIES, INC., TITUS BOATS, LLC, KINJIRUSHI KOKUSAI, INC. and JOHN DOES NOS. 1-5, Defendants.</p>	<p>PLAINTIFF'S MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENT AND DISMISSAL OF LAWSUIT WITH PREJUDICE AND MEMORANDUM IN SUPPORT</p> <p>2:13-cv-00575 BSJ</p> <p>The Honorable Bruce S. Jenkins</p>
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Plaintiff 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 *Securities and Exchange Commission v. National Note of Utah, LC et al.* (the "Enforcement Action"),¹ respectfully requests that the Court enter the proposed Order,

¹ Civil Case No. 2:12-cv-00591 (D. Utah) (Jenkins, J.).

attached hereto as **Exhibit A**, approving the below-described Settlement Agreement and Release entered into by the Receiver and the Defendants in the above-captioned ancillary action, a copy of which is attached hereto as **Exhibit B**, and dismissing this action with prejudice. 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

The Enforcement Action

1. On June 25, 2011, the Enforcement Action was commenced by the Securities and Exchange Commission against 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 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.³

2. The Court has directed and authorized the Receiver to, among other things, do the following:

² Enforcement Action Docket No. 9 (Receivership Order).

³ See generally, *id.*

- “[D]etermine the nature, location and value of all property interests of the Receivership Defendants and the Palmer Entities . . . [.]”⁴
- “[T]ake custody, control and possession of all Receivership Property and records. . . [.]”⁵
- “[M]anage, 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
- “[U]se 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[.]”⁷
- “[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.”⁸
- “[P]ursue, 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[.]”⁹

3. Since his appointment, the Receiver has engaged in an investigation of the Receivership Defendants and the Receivership Estate. This investigation is ongoing. Based on his investigation to date, the Receiver determined that the Receivership Estate has claims and causes of action against numerous parties.¹⁰

⁴ *Id.* at ¶ 7(A).

⁵ *Id.* at ¶ 7(B).

⁶ *Id.* at ¶ 7(C).

⁷ *Id.* at ¶ 7(D).

⁸ *Id.* at ¶ 37.

⁹ *Id.* at ¶ 7(J).

¹⁰ Receiver Declaration ¶ 3.

4. Relevant to this Motion are the Receivership Estate's claims against Reed Larsen ("Larsen") and companies which the Receiver believes Larsen controls or has an interest in, including Superior Properties, Inc. ("Superior Properties"), Titus Boats, LLC ("Titus Boats") and Kinjirushi Kokusai, Inc. ("KKI") (collectively, the "Entity Defendants" and together with Larsen, the "Defendants"). Larsen served or serves as the President of Superior Properties, a manager of Titus Boats, and the President, Secretary, Treasurer, and Director of KKI. National Note's records also show that Larsen managed many of the Receivership Entities, including Homeland Funding, Corp., Homeland Mortgage, L.C., Homeland Minerals, LLC, Homeland Holding Corp. and Old Glory Minting Company, LLC. He worked with Palmer and the Receivership Entities for fifteen years and identified himself as the Vice President of Homeland Holding Corporation and subsidiaries.

5. The Receiver believes that the Receivership Estate has valid claims against the Defendants based on transfers they received from NNU and Larsen's management role prior to the commencement of the Enforcement Action.¹¹

6. On May 21, 2013, the Court entered in the Enforcement Action an *Order Granting Receiver's Ex Parte Motion For Leave To Commence Legal Proceedings*¹² authorizing the Receiver to commence all claim and causes of action that are the property of the Receivership Estate, including claims against insiders and claims against overpaid investors.

¹¹ Receiver Declaration ¶ 4.

¹² Enforcement Action Docket No. 315.

The Complaint Against the Defendants and the Defendants' Claimed Financial Standing

7. The Receiver filed a complaint against the Defendants on June 24, 2013, thus commencing the above-captioned proceeding, ancillary to the Enforcement Action.¹³ The Receiver filed a First Amended Complaint (the "Amended Complaint") on October 7, 2013.¹⁴

8. The Amended Complaint alleges that between January 1, 2007 and the commencement of the Enforcement Action, NNU transferred funds totaling \$3,047,789.06,¹⁵ to the Defendants as follows:

- a. A total of \$214,832.84 was transferred to Defendant Larsen, primarily as salary.
- b. A total of \$830,206.35 was transferred to Defendant Superior Properties, which it appears was paid primarily for the benefit of Larsen related to Larsen's salary, management fees, reimbursements for insurance and other expenses, and annual bonuses.
- c. A total of \$62,921.89 was transferred to Defendant Titus Boats, which it appears was for "reimbursements-resin," "Boat repair," and "hull rebuild."
- d. A total of \$1,271,846.00 was transferred to Defendant KKI. From 2007 through 2011, KKI invested funds with NNU. KKI transferred funds to NNU in the total amount of \$628,864.02 from 2007 through 2011 (the "KKI Principal Investment"). From 2007 through 2012, NNU transferred a total of \$1,271,846.00 in cash to KKI (the "KKI Transfers"). Of the KKI Transfers,

¹³ Docket No. 2.

¹⁴ Docket No. 24.

¹⁵ *Id.* (Amended Complaint at Prayer for Relief).

\$642,981.98 is an amount that is over and above the KKI Principal Investment. The Complaint alleges that Larsen was an insider of NNU, and thus, it seeks the return of the full amount of the KKI Transfers.

e. An additional \$25,000.00 was transferred to KKI and Larsen in the form of a loan.

9. The Amended Complaint further alleges that transfers made by NNU to the Defendants are avoidable and may be recovered under the Utah Fraudulent Transfer Act¹⁶ and under theories of constructive trust, disgorgement, breach of contract, and unjust enrichment.¹⁷

10. On November 6, 2013, the Defendants filed an Answer to the Amended Complaint.¹⁸

11. Thereafter, Larsen represented to the Receiver that even if the Receiver were successful in obtaining a judgment against him and the Entity Defendants, he and the Entity Defendants did not have funds or property sufficient to pay the judgment.¹⁹ The Receiver thus determined that it would be in the best interest of the Receivership Estate to engage in discussions with Larsen regarding the Defendants' financial standing prior to expending funds to pursue the claims made in the Amended Complaint.²⁰

¹⁶ The Receiver brought claims under Utah Code Annotated §§ 25-6-(1)(a) and (1)b, 25-6-6(1) and (2), and 25-6-8. *Id.*

¹⁷ *Id.* (Amended Complaint at ¶¶ 78-131).

¹⁸ Docket No. 25.

¹⁹ Receiver Declaration ¶ 5.

²⁰ Receiver Declaration ¶ 6.

12. Accordingly, the Receiver requested significant financial information from the Defendants, which was provided to him. This information included, among other things, tax returns for Larsen and some of the Larsen Defendants and an affidavit from Larsen setting forth assets and liabilities under oath, and subject to penalty of perjury (the "Larsen Affidavit"). The Receiver also conducted an independent investigation of the Defendants' financial standing, including by employing a private investigator to do an asset search of Larsen's assets.²¹

13. Based on the information obtained, including Larsen's sworn statements, the Receiver determined the following:

- a. Larsen. Larsen has no assets or income of significant value. Specifically, Larsen has not owned real property since October 2013 (he is currently residing in a rented house), his two vehicles are eight and seventeen years old, he has a single bank account with a balance of \$1,268.13, and most of the entities in which he appears to have an interest have expired charters. Tax returns for the year 2011²² show total annual household income of \$48,534.00. Larsen's household income includes his wife's monthly gross wages of \$4,300.00 and his monthly gross income of \$5,000 from HMI Management, LLC ("HMI"), an entity that was formed after the commencement of the Enforcement Action by certain NNU investors to investigate the commercial potential for recovery of precious metals

²¹ Receiver Declaration ¶ 7.

²² Larsen last filed a federal income tax return in 2011.

from or other uses for ores that were owned by NNU.²³ The Larsens have two minor children to support, and it appears that approximately ½ of monthly household income is spent on making payments on bank debts totaling \$272,080.92. Since the commencement of the Enforcement Action, Larsen has sold assets, including a boat, houseboat, scooter, piano and household furnishings, to raise cash to pay living expenses and debts.

- b. Superior Properties. The majority of Superior Properties' assets consist of loans claimed to have been made to NNU, other companies owned by Larsen or defunct entities. None of these accounts receivable will be recoverable. Before accounting for these uncollectable debts, Superior Properties has negative equity of (\$20,531.37), and negative equity increases to (\$496,057.67) when the bad debt is included. Superior Properties only other assets appear to be \$2,140.65 in cash as of the time of the making of the Larsen Affidavit, and tools and equipment valued at \$7,500.00. However, it owes \$165,664.23 to creditors. Larsen on

²³ In November 2012, the Receiver entered into an agreement with HMI under which HMI took possession of the ore, which the Receiver deemed to be burdensome to the Receivership Estate, and promised to pay the Receivership Estate a profit share of HMI's efforts. See *Second Status Report*, Enforcement Action Docket No. 170, at pp. 18-19; *Third Status Report*, Enforcement Action Docket No. 288, at p. 17; *Fourth Status Report*, Enforcement Action Docket No. 408, at p. 25; *Fifth Status Report*, Enforcement Action Docket No. 510, at p. 20; *Sixth Status Report*, Enforcement Action Docket No. 598, at p. 16; *Seventh Status Report*, Enforcement Action Docket No. 639, at p.14. To date, the Receiver is informed that HMI has not obtained any profits. See *id.* Any monies paid to Larsen by HMI are not sourced from the Receivership Estate or assets of the Receivership Estate. Rather, the Receiver believes that Larsen is being paid by the investors who formed HMI. Receiver Declaration ¶ 9.

behalf of Superior Properties states that Superior Properties reported losses of \$35,843.00 in its last filed tax return.

- c. Titus Boats. This entity does not appear to have any recoverable assets inasmuch as \$2,000.00 in assets and \$186,084.45 in liabilities have been reported. Larsen states that in its last filed tax return, Titus Boats reported a loss.
- d. KKI. The majority of KKI's assets, like those of Superior Properties, consist of loans claimed to have been made to NNU, other companies owned by Larsen or defunct entities. None of these accounts receivable will be recoverable. KKI's bank accounts have balances totaling \$57.13. After writing off uncollectible debt, KKI's equity is negative (\$1,386,672.90). The most recent tax return filed by KKI reported a loss.²⁴

14. In addition to claiming lack of ability to pay any judgment, Larsen and, presumably the Entity Defendants he controls, contest the Receiver's claims against them, and Larsen contends that the Defendants have substantial claims against the Receivership Entities that would be offset against any judgment. The amounts that Larsen maintains are owed to him by Receivership Entities include: \$179,013.00 from Old Glory Minting Company, LLC; \$218,069.83 from Homeland Funding Corporation; and unreimbursed expenses in the total amount of \$21,207.46. Larsen also asserts that Receivership Entities also owe funds to KKI in the total amount of \$356,998.49.

²⁴ Receiver Declaration ¶ 8.

The Settlement Agreement

15. Upon analysis of the financial issues discussed above, the Receiver agreed to enter into settlement negotiations with the Defendants. After good faith and arms' length discusses, the parties entered into the Settlement Agreement and Release ("Agreement"), a copy of which is attached hereto as **Exhibit B**.²⁵

16. For purposes of summary and without modifying any terms of the Agreement in any way, the principal terms of the Agreement are as follows:

- a. Larsen will pay \$5,000.00 to the Receivership Estate, and release any and all interests in property of the Receivership Estate, including any and all Assignments of Beneficial Interests or other interests in real property held by the Receivership Estate.²⁶
- b. Larsen will pay additional funds to the Receivership Estate if his financial situation improves between the time of the Agreement and December 31, 2017 pursuant to the terms set forth in the Agreement. In connection with this obligation, Larsen must provide the Receiver with complete and accurate financial information between the time of the Agreement and April 30, 2018.²⁷
- c. The Defendants executed confessions of judgment in connection with the Agreement as follows: Larsen agrees to a judgment in the amount of \$214,832.84, offset against any payments made according to subparagraph b above, and

²⁵ Receiver Declaration ¶ 10.

²⁶ Exh. B (Settlement Agreement ¶¶ 2 and 5).

²⁷ Exh. B (Settlement Agreement ¶ 3).

Superior Properties and KKI agree to a judgment in the amount of \$285,167.16. Upon default of the Agreement, including the provision of materially false financial information in connection therewith, the Receiver may file those confessions of judgment and seek payment of those amounts therein as set forth in the Agreement.²⁸

- d. If Larsen files for relief under the Bankruptcy Code, or if an involuntary petition is filed against him, Larsen agrees that the Receivership Estate will have a liquidated claim in the bankruptcy proceedings in the amount of \$209,832.84, offset against any payments paid according to subparagraph b above.²⁹
- e. Larsen will assist the Receiver in the Receiver's investigation and provide truthful information or testimony as requested by the Receiver as further described in the Agreement.³⁰
- f. The Agreement includes a mutual release of claims.³¹
- g. The Receiver will dismiss the lawsuit against Larsen and his companies with prejudice.³²

17. This Agreement (a) has been negotiated at arm's length and in good faith by the Receiver and the Defendants, (b) will avoid the expense, delay and inherent risks of litigation, (c)

²⁸ Exh. B (Settlement Agreement ¶ 3(b)).

²⁹ Exh. B (Settlement Agreement ¶ 3(g)).

³⁰ Exh. B (Settlement Agreement ¶ 4).

³¹ Exh. B (Settlement Agreement ¶¶ 6 and 7).

³² Exh. B (Settlement Agreement ¶ 11).

will result in the collection of some funds for the benefit of the Receivership Estate and a significant reduction of claims and/or defenses that might have been asserted against the Receivership Estate, and (d) has taken into account issues related to the collection of any judgment that may be obtained against the Defendants.³³

18. The Receiver believes that the Agreement is fair, adequate and reasonable in light of the circumstances of this case, and that the Agreement is in the best interests of the Receivership Estate, and should be approved by the Court.³⁴

II.

APPLICABLE LAW AND ANALYSIS

19. 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.”³⁵

20. “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.”³⁶ The Tenth Circuit has 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

³³ Receiver Declaration ¶ 11.

³⁴ Receiver Declaration ¶ 14.

³⁵ *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)).

³⁶ *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).

expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.³⁷

21. Here, the Agreement is fair, reasonable and adequate and should be approved by the Court for at least the following reasons: (a) it was fairly and honestly negotiated at arm's length and in good faith by the parties; (b) while the Receiver is confident that he will prevail in any litigation against the Defendants, the facts and issues in question appear to be complex, and will require significant time and expense to litigate; (c) the Defendants' apparent inability to pay a judgment based on sworn statements and independent investigation; (d) the value of a modest immediate recovery along with the prospect of additional recoveries if Larsen's income or assets increase, outweigh the mere possibility of future recovery after potentially protracted and expensive litigation, particularly in light of the Defendants' current financial standing; (e) the Defendants' releases, including the release of all interests in property, including any Assignments of Beneficial Interests in real property, the disallowance of claims against the Receivership Estate, and the avoidance of related costs that would be involved in disputing the same.³⁸

22. Furthermore, while the Receiver is confident of the Receivership Estate's claims and right to recover on the claims at issue, litigation poses inherent risks, and those risks, together with the substantial collection risks present here, make the proposed settlement fair, adequate and reasonable.³⁹

³⁷ *Jones*, 741 F.2d at 324.

³⁸ Receiver Declaration ¶ 12.

³⁹ Receiver Declaration ¶ 13.

23. Accordingly, the Receiver submits that that the Agreement is in the best interests of the Receivership Estates, and asks that the Agreement be approved.⁴⁰

III.

CONCLUSION

For the reasons set forth above, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit A**, approving the proposed Agreement and dismissing this matter with prejudice.

DATED this ___ day of July, 2014.

DORSEY & WHITNEY LLP

 /s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Nathan S. Seim
Attorneys for Receiver

⁴⁰ Receiver Declaration ¶ 14.

CERTIFICATE OF SERVICE

I hereby certify that service of the above **PLAINTIFF'S MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENT AND DISMISSAL OF LAWSUIT WITH PREJUDICE AND MEMORANDUM IN SUPPORT** (the "Motion") was filed with the Court on this 28th day of July, 2014, and served via ECF on all parties who have requested notice in this case, as follows:

Brent R. Baker – brb@clydesnow.com
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D. Loren Washburn – dlw@clydesnow.com
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Attorneys for Defendants

Furthermore, I certify that on the 28th day of July 2014, the Motion was served on the following parties by U.S. mail, postage prepaid:

Wayne Palmer
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/s/ Suanna Armitage