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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: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, and individual,</p> <p style="text-align: right;">Defendants.</p>	<p>RECEIVER’S MOTION SEEKING AUTHORIZATION TO SELL KANAB CABIN FREE AND CLEAR OF PURPORTED INTERESTS SUBJECT TO HIGHER AND BETTER OFFERS AND MEMORANDUM IN SUPPORT</p> <p>2:12-cv-00591 BSJ</p> <p>The Honorable Bruce S. Jenkins</p>
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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 of record, hereby files this motion (the “Motion”), and respectfully requests that the Court authorize him to sell certain real property of the Receivership Estate, described more fully and defined in the Memorandum in Support as the “Kanab Cabin” subject to higher and better offers.

This Motion is supported by the Declaration of Receiver R. Wayne Klein (the “Receiver”

Declaration”), which has been filed concurrently herewith. A proposed Order is submitted herewith and attached hereto as Exhibit A.

MEMORANDUM IN SUPPORT

I.

FACTUAL BACKGROUND

1. On June 25, 2012, the above-captioned case was commenced by the Securities and Exchange Commission (the “SEC”) against Defendants National Note of Utah, LC (“NNU”) and 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, forty-one of its affiliated companies (the “Palmer Entities”) (collectively 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 use Receivership Property for the benefit of 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 the Palmer Entities”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
- “[L]ocate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates, either at public or private sale, on 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 real property.”⁸
- “[S]ell, and transfer clear title to, all real property in the Receivership Estates” upon order of the Court “pursuant to procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004.”⁹

3. On July 9, 2012, First National Bank of Layton (“FNB”) filed a motion to intervene in this case (the “Motion to Intervene”).¹⁰

4. On September 6, 2012, the Court entered an Order granting the Motion to Intervene.¹¹

⁵ *Id.* at ¶ 7(D).

⁶ *Id.* at ¶ 19.

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 38.

⁹ *Id.* at ¶ 39.

¹⁰ Docket No. 23.

¹¹ Docket No. 51.

5. On September 20, 2012, FNB filed its complaint in intervention (“FNB’s Complaint”), which among other things sought an order lifting the lifting the receivership to release control of the Salt Lake Parcel (as defined in FNB’s Complaint, but generally known in this case as the “Cottonwood Property”) and the Kanab Cabin, and declaring FNB as a first priority secured creditor of both properties.¹²

II.

REAL PROPERTY TO BE SOLD

Kanab Cabin

6. Since his appointment, the Receiver has identified numerous real properties as being part of the Receivership Estate, and where appropriate has listed such property for sale.¹³

7. Relevant to this Motion is a parcel of real property of the Receivership Estate with the address of 1286 S. Knoll Ave, Kanab, Utah 84741 (the “Kanab Cabin”), and is more particularly described as follows:

All of Lot 191, VERMILLION CLIFF ESTATES, according to the Official Plat thereof, on file in the Office of the Recorder of Kane County, State of Utah.

8. The Kanab Cabin sits on over two acres of property and includes a partially finished residential home.¹⁴ The Kanab Cabin is titled in the name of National Note of Utah

¹² Docket No. 61. On February 27, 2013, the Court entered an *Order Authorizing Receiver’s Abandonment of Cottonwood Property*, Docket No. 179, which authorized the Receiver to abandon the Receivership Estate’s interest in the Salt Lake Property to allow FNB to exercise its remedies with respect to the Salt Lake Property and dismissed FNB’s Complaint with respect to the Salt Lake Property. This Order did not impact FNB’s Complaint with respect to the Kanab Cabin.

¹³ Receiver Declaration ¶ 4.

¹⁴ *Id.* at ¶ 6 & Exh. A (Title Report).

LC.¹⁵

9. On October 31, 2013, the Court entered an Order approving the Receiver's settlement agreement with John Spinola ("Spinola"), whereby Spinola released his second priority deed of trust on the Kanab Cabin.¹⁶

10. FNB holds a first priority secured interest in the Kanab Cabin and is owed at least \$177,000 to release its interest.¹⁷

11. The Receiver has negotiated a discounted payoff amount with FNB and FNB has agreed to accept \$147,500 to release its interest in the Kanab Cabin if the sale of the Kanab Cabin is closed by October 1, 2014 (the "FNB Agreement").¹⁸

Marketing the Kanab Cabin

12. On or about October 25, 2013, the Receiver signed an agreement for the Kanab Cabin to be listed for sale (the "Listing Agreement") through Providence Realty Group (the "Realtor").¹⁹ A copy of the Listing Agreement is attached as Exhibit B to the Receiver Declaration.

13. Under the Listing Agreement, the Receiver agreed to pay the Realtor a standard commission of 8% of the contract purchase price to be shared between the seller's agent and the

¹⁵ *Id.* at ¶ 7 & Exh. A (Title Report).

¹⁶ Docket No. 506.

¹⁷ *Id.* at ¶ 8.

¹⁸ *Id.* at ¶ 9.

¹⁹ *Id.* at ¶ 10 & Exh. B (Listing Agreement).

buyer's agent.²⁰

14. To determine an offering price and comply with his duties, the Receiver obtained the opinion of his Realtor and an appraisal of the Kanab Cabin. The Receiver also considered an appraisal that was obtained by FNB in determining the listing price for the Kanab Cabin (the "FNB Appraisal"), a copy of which is attached to the Receiver Declaration as Exhibit C.²¹

15. In connection with the FNB Agreement, and FNB's agreement to accept \$147,500 to release its interests in the Kanab Cabin, the Receiver agreed with FNB to reduce the list price for the Kanab Cabin to \$199,000 to facilitate a rapid sale of the Kanab Cabin.²²

Appraisers

16. The FNB Appraisal assigned a value of \$200,000.00 to the Kanab Cabin.²³

17. The Receiver has obtained an appraisal for the Kanab Cabin (the "Morley Appraisal") from Jeffrey T. Morley ("Morley"), and is concurrently seeking Court-appointment of Steven R. Williams ("Williams") and Richard K. Hansen ("Hansen") as appraisers for the Kanab Cabin, through the *Receiver's Ex Parte Motion for Approval of Appraisers for Kanab Cabin and Memorandum in Support* (the "Appraiser Motion"). The Court approved this motion on August 12, 2014.²⁴ True and correct copies of the relevant portions of

²⁰ *Id.* at Exh. B (Listing Agreement).

²¹ *Id.* at ¶ 11.

²² *Id.* at ¶ 12.

²³ *Id.* at Exh. C (FNB Appraisal).

²⁴ Docket No. 725. The Court also approved the Receiver's motion to authorize publication of notice of the sale. Docket No. 724.

the Morley Appraisal are attached to the Receiver Declaration as Exhibit D.²⁵

18. Morley appraised the Kanab Cabin for a market value of \$244,000.00.²⁶ The Receiver will obtain the appraisals from Williams and Hansen and present those appraisals to the Court prior to any hearing on this Motion.²⁷

The Purchase Agreement

19. On or about August 1, 2014, the Receiver entered into a purchase agreement (the “Purchase Agreement”) on behalf of the Receivership Estate with Ransom H. and Nyla S. Love (collectively, the “Buyers”), agreeing to sell the Kanab Cabin to Buyers for a purchase price of \$197,000.00 subject to Court approval. A copy of the Purchase Agreement, including the addendum thereto, is attached to the Receiver Declaration as Exhibit E.²⁸

20. Under the Purchase Agreement, the sale to Buyers is subject to higher and better offers.²⁹ The Buyers desire to purchase the Kanab Cabin as a “like-kind” exchange property as described in Section 1031 of the Internal Revenue Code and have requested an expedited closing to comply with the applicable requirements of Section 1031 of the Internal Revenue Code. The Receiver understands that a closing must occur by no later than August 29, 2014.³⁰

21. Due to the need for expedited action the Receiver has requested that the additional two appraisals, the publication of notice, and consideration of the motion be allowed to move

²⁵ *Id.* at ¶13 & Exh. D (Morley Appraisal).

²⁶ *Id.* at Exh. D (Morley Appraisal).

²⁷ *Id.* at ¶ 14.

²⁸ *Id.* at ¶ 15, Exh. E (Purchase Agreement).

²⁹ *Id.* at Exh. E (Purchase Agreement).

³⁰ *Id.* at ¶ 16.

forward during the same time period. The Court has already approved the Receiver's motion regarding publication and the appraisers. The buyer's due diligence period also will still be open during part of this time, leading to the possibility that the buyer will be able to cancel the purchase agreement without forfeiting his earnest money deposit if the buyer finds defects in the property.³¹

22. As discussed below, if the Court approves the sale pursuant to the terms of the Purchase Agreement, the Receiver anticipates paying at the time of closing of the sale any outstanding property taxes, the ordinary costs of sale – including market-rate closing costs and an 8% commission to the Realtor to be shared between the seller's agent and the buyer's agent, payment of a discounted amount owed to FNB which was negotiated by the Receiver, and payment of the road assessment owed to Kane County. Another deed of trust, held by Spinola, which was recorded against the property at the time the Receiver was appointed, was subsequently released by Spinola in a settlement of a lawsuit filed by the Receiver.³²

23. Any other financial interests against the Kanab Cabin will not be paid at the time of closing of the sale. Rather, any such interests (to the extent that they exist and without any waiver of the Receiver or the Receivership Estate's rights and defenses related thereto) will survive the sale and will attach to the "Net Sale Proceeds," defined as the gross sale proceeds minus costs paid at closing described above.³³

24. The Receiver will separately account for the Net Sale Proceeds pending resolution

³¹ *Id.* at ¶ 17.

³² *Id.* at ¶ 18.

³³ *Id.* at ¶ 19.

of any disputes related to interests that may exist against the Kanab Cabin.³⁴

Free and Clear Sale

25. The Receiver proposes to sell the Kanab Cabin free and clear of all interests therein, with any interests that may exist attaching to the Net Sale Proceeds. In so doing, the Receiver is not in any way waiving any rights, claims, interests or defenses to any claims or interests made against the Kanab Cabin or to the Net Sale Proceeds.³⁵

26. To determine interests, if any against the Kanab Cabin, the Receiver obtained the Title Report attached as Exhibit A to the Receiver Declaration.³⁶

27. According to the Title Report for the Kanab Cabin, the following exceptions to title exist:

- a. Taxes for the year 2014, which are liens, but not yet due or payable, taxes for the years 2011, 2012, and 2013, which are due in the following amounts \$2,944.69, \$2,908.32, and \$2,760.47 plus interest, penalties and costs;³⁷
- b. A “Notice of Assessment Interest” recorded on August 1, 2008, in the amount of \$7,745.00, plus interest, executed by Kane County, Utah;³⁸
- c. A “Deed of Trust” dated May 23, 2011 by and between NNU as trustor, in

³⁴ *Id.* at ¶ 20.

³⁵ *Id.* at ¶ 21.

³⁶ *Id.* at ¶ 7, Exh. A.

³⁷ *Id.* at Exh. A, ¶ 12.

³⁸ *Id.* at Exh. A, ¶ 24.

favor of FNB as beneficiary, showing an original principal amount of \$155,200.00;³⁹

- d. An Assignment of Rents dated May 23, 2011, by and between NNU as grantor and FNB as lender;⁴⁰
- e. A UCC Financing Statement recorded on May 24, 2011, by and between NNU as debtor and FNB as secured party;⁴¹ and
- f. A Notice of Default and Election to Sell under the terms of the Deed of Trust recorded on May 22, 2012.⁴²

28. The Receiver proposes paying the delinquent property taxes owed from 2011, 2012, and 2013, the Notice of Assessment Interest, and a discounted amount to FNB from the proceeds of the sale of the Kanab Cabin. Property taxes on the Kanab Cabin from 2014 are now a lien that is not yet due.⁴³

29. The Receiver proposes allowing any other interests in the Kanab Cabin that may be asserted to attach to the Net Sale Proceeds while the validity of such interests is litigated. In so doing, the Receiver is in no way waiving any rights, claims, interests, or defenses to any claims or interests made against the Kanab Cabin or to the Net Sale Proceeds.⁴⁴

³⁹ *Id.* at Exh. A, ¶ 25. As noted above, FNB has agreed to reduce the amount it will require to be paid at the closing.

⁴⁰ *Id.* at Exh. A, ¶ 26.

⁴¹ *Id.* at Exh. A, ¶ 27.

⁴² *Id.* at Exh. A, ¶ 29.

⁴³ *Id.* at ¶ 22.

⁴⁴ *Id.* at ¶ 23.

Best Interests

30. The sale of the Kanab Cabin as proposed is beneficial for and in the best interests of the Receivership Estate.⁴⁵

31. The proposed sale will result in cash based on the fair market value of the Kanab Cabin. As noted, the appraised value of the Kanab Cabin is \$244,000.00. The appraisal obtained by FNB was \$200,000.00, for an average appraised value of \$222,000.00. The purchase price of \$197,000.00 is over 80% of the appraised value of the Kanab Cabin based on the Receiver's appraisal and over 88% of the average of the two appraisals.⁴⁶

32. Sale of the Kanab Cabin at this time will also slightly reduce the burden to the Receivership Estate by reducing the time spent by the Receiver in managing the property and, more importantly, will maximize the value of the Kanab Cabin by ending tax and maintenance obligations associated with the property.⁴⁷

33. The sale of the Kanab Cabin and payment of a discounted the amount to FNB will resolve FNB's Complaint and FNB will receive no further distribution from the Receivership Estate.⁴⁸

34. The sale to Buyers proposed herein is subject to higher and better offers, after publication notice as provided for below.⁴⁹

⁴⁵ *Id.* at ¶ 24.

⁴⁶ *Id.* at ¶ 25.

⁴⁷ *Id.* at ¶ 26.

⁴⁸ *Id.* at ¶ 27.

⁴⁹ *Id.* at ¶ 28.

Publication Notice

35. The Receiver separately filed his *Ex Parte Motion for Order Approving Method and Form of Publication Notice of Sale of Real Property (Kanab Cabin)* (the “Publication Motion”), seeking the Court’s approval of the method and form of proposed publication notice as required under 28 U.S.C. § 2001(b).⁵⁰ The Court granted this motion on August 12, 2014.⁵¹

36. Upon entry of an Order granting the Publication Motion, the Receiver shall publish notice of the proposed sale in *The Salt Lake Tribune*, a newspaper published in Salt Lake City, Utah, and the *Southern Utah News*, a newspaper published in Kanab, Utah, using the method and form of notice approved by the Court.⁵²

37. In the event that the Receiver receives and accepts a higher and better offer, he proposes that this Motion and any Order authorizing this proposed sale be deemed to apply to the higher and better offeror, without further notice or hearing inasmuch as the sale will be appropriate for the reasons set forth below. In such event, the Receiver will file a notice of sale disclosing the sale to the higher and better offer.

III.

ARGUMENT

Based on the facts above, the Receiver respectfully requests authorization to sell the Kanab Cabin pursuant to the terms of the Purchase Agreement free and clear of liens and interests, with any such interests, to the extent that they exist, attaching to the Net Sale Proceeds

⁵⁰ *Id.* at ¶ 29.

⁵¹ Docket No. 724.

⁵² Receiver Declaration at ¶ 30.

and held by the Receiver pending resolution of any disputes related thereto. Sale of the Kanab Cabin as proposed is within the scope of the Receiver's authority under the Receivership Order as quoted above and 28 U.S.C. § 2001(b), it is in the best interests of the Receivership Estate, and the sale serves the purposes of the receivership by providing a "realization of the true and proper value" of the Kanab Cabin.⁵³

Sale of the Kanab Cabin as Proposed is Beneficial to the Receivership Estate

Section 2001(b) of title 28 of the United States Code provides that the Court may authorize the sale of real property through private sale if such sale is in the "best interests" of the Receivership Estate. Furthermore, the Receivership Order authorizes the Receiver, subject to Court approval, to sell property of the Receivership Estate "with due regard to the realization of the true and proper value of such Receivership Property."⁵⁴ Sale of the Kanab Cabin as proposed herein is in the best interests of the Receivership Estate for several reasons, including at least the following.

First, the sale will result in cash for the Receivership Estate based on the fair market value of the Kanab Cabin. The Kanab Cabin has been appraised by two appraisers and will be appraised by two other appraisers prior to any hearing on this Motion.⁵⁵ The Morley Appraisal and the FNB Appraisal have and the other two appraisals will take into consideration current market conditions, sales of comparable properties, and the particular nature of the Kanab Cabin. The Kanab Cabin will be sold for \$197,000.00, which is over 80% of the appraised value of the

⁵³ Receivership Order ¶ 38.

⁵⁴ *Id.*

⁵⁵ Receiver Declaration at ¶¶ 11, 13-14.

Kanab Cabin based on the Morley Appraisal and over 88% of the average of the two appraisals.⁵⁶

Second, the sale of the Kanab Cabin at this time as proposed will reduce, albeit slightly, the burden on the Receivership Estate and maximize the value of the property. The Receiver will no longer have to spend time managing the property, and the Receivership Estate will no longer have obligations related to paying taxes on and other maintenance and upkeep expenses related to the property.⁵⁷

Third, the sale of the Kanab Cabin and payment of the substantially reduced amount owed to FNB through the FNB Agreement will resolve FNB's Complaint and FNB will receive no further distribution from the Receivership Estate.⁵⁸ Accordingly, the Receiver requests that the Court approve this sale under the terms outlined herein.

Request to Sell the Kanab Cabin Free and Clear of Interests

As discussed above, the Receiver proposes to sell the Kanab Cabin free and clear of any interest in the property, with any such interest attaching to the Net Sale Proceeds. The Court may order such a sale so long as parties with interests against the property are given proper notice. The Receiver will inform FNB, the appropriate taxing authorities, and Kane County by serving each party with a copy of this Motion.⁵⁹

⁵⁶ *Id.* at ¶ 25, Exh. C, Exh. D.

⁵⁷ *Id.* at ¶ 26.

⁵⁸ *Id.* at ¶ 27.

⁵⁹ *Id.* at ¶ 31.

Compliance With 28 U.S.C § 2001

The Receivership Order provides that the Court may require that the proposed sale of real property satisfy 28 U.S.C. § 2001.⁶⁰ Subsection (b) of § 2001 permits, with Court approval, a private sale of receivership property as proposed herein, but it conditions such sale on (1) obtaining a purchase price that is no less than two-thirds of the appraised value of the property; (2) appointing “three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities[;]” (3) publication notice of the sale “at least ten days before confirmation[;]” and (4) cancellation of the sale “if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.”⁶¹ Here, the Receiver has complied with each of these factors.

Specifically, factor (1) is met in this case inasmuch as the purchase price for the Kanab Cabin is over 80% of the appraised value of the Kanab Cabin based on the Morley Appraisal and over 88% of the average of the two appraisals and the Receiver will provide the Court with copies of the two additional appraisals prior to any hearing on this Motion. The Receiver anticipates that the \$197,000.00 purchase price will exceed 2/3 of the average appraised value of the Kanab Cabin.⁶²

Factor (2) will be met prior to the hearing on this Motion because the Receiver has obtained one appraisal and will obtain two additional appraisals of the Kanab Cabin from

⁶⁰ Receivership Order ¶ 39.

⁶¹ 28 U.S.C. § 2001(b).

⁶² Receiver Declaration at ¶ 25.

experienced, third party appraisers.

Factor (3) will be met as the Receiver will publish notice of the proposed sale immediately upon the Court's entry of an Order approving the method and form of such notice as requested in the Publication Motion filed concurrently herewith.

Factor (4) also has been met, inasmuch as the Receiver understands that the sale will not be approved if he receives a higher and better offer that is in compliance with § 2001(b) as quoted above and the sale is conditioned on this factor.⁶³ In the event that the Receiver receives and accepts a higher and better offer, he proposes that this Motion and any Order authorizing this proposed sale be deemed to apply to the higher and better offeror without further notice or hearing inasmuch as the sale will be appropriate for the reasons set forth below. In such event, the Receiver will file a notice of sale disclosing the sale to the higher and better offeror.

CONCLUSION

For the foregoing reasons, the Receiver requests that the Court grant the Motion, thus authorizing the sale of the Kanab Cabin pursuant to the Purchase Agreement or to a higher and better offeror free and clear of purported interests.

DATED this 13th day of August, 2014.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt
Chris Martinez
Jeffrey M. Armington
Attorneys for Receiver

⁶³ Receiver Declaration ¶ 28.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION SEEKING AUTHORIZATION TO SELL KANAB CABIN FREE AND CLEAR OF PURPORTED INTERESTS SUBJECT TO HIGHER AND BETTER OFFERS AND MEMORANDUM IN SUPPORT** was filed with the Court on this 13th day of August, 2014, and served via ECF on all parties who have requested notice in this case:

/s/ Jeffrey M. Armington

Furthermore, I certify that on the 13th day of August, 2014, the **RECEIVER'S MOTION SEEKING AUTHORIZATION TO SELL KANAB CABIN FREE AND CLEAR OF PURPORTED INTERESTS SUBJECT TO HIGHER AND BETTER OFFERS AND MEMORANDUM IN SUPPORT** was served on the following parties by U.S. Mail postage prepaid:

Wayne L. Palmer
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c/o Wayne Z. Bennett
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One Utah Center 13th Floor
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Kane County Treasurer
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John Spinola
c/o Barry Toone
Miller Guymon, P.C.
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Salt Lake City, UT 84111

/s/ Jeffrey M. Armington