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**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.

And

THE TRUE & MARJORIE KIRK FAMILY
TRUST,

Intervenor.

**RECEIVER'S MOTION TO APPROVE
SETTLEMENT AGREEMENT WITH
THE TRUE & MARJORIE KIRK
FAMILY TRUST, 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 Settlement Agreement With the True & Marjorie Kirk Family Trust, 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. A proposed order is attached hereto as **Exhibit A**.

MEMORANDUM OF SUPPORT

I.

RELIEF SOUGHT

The Receiver seeks an Order from the Court in the form attached hereto as **Exhibit A**, approving the proposed Settlement Agreement, a copy of which is attached hereto as **Exhibit B**, with the True & Marjorie Kirk Family Trust (the “Kirk Trust”). Additionally, as part of the implementation of the Settlement Agreement, the Receiver seeks authorization to transfer the property defined below to the Kirk Trust “as is” “where is” pursuant a Special Warranty Deed; pay back real estate taxes associated with the property, and obtaining an Order dismissing the Kirk Trust’s *Complaint in Intervention* and the Receiver’s *Counterclaim*.

II.

STATEMENT OF FACTS

The Receiver and the Receivership Estate

1. On June 25, 2012, the above-captioned case was commenced by the Securities and Exchange Commission against Defendants National Note of Utah, L.C. (“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-

¹ Docket No. 9 (Receivership Order).

one of its affiliated companies (the “Palmer Entities”), 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 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

² See generally, *id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

⁵ *Id.* at ¶ 7(C).

⁶ *Id.* at ¶ 19.

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 39.

all actions with respect to property of the receivership estate, including the Property described in detail below.⁹

The Property, Kirk Trust's Trust Deed, and the Initial Agreement

5. NNU is the record title owner of the following real property located at 580 North Main, Brigham City, Box Elder County, Utah, which is more particularly described as follows:

BEGINNING AT THE NORTHWEST CORNER OF LOT 4, BLOCK 43, PLAT C, BRIGHAM CITY SURVEY, THENCE SOUTH 12 RODS, THENCE EAST 10 RODS, THENCE SOUTH 4 RODS, THENCE EAST 3 RODS, THENCE NORTH 10 RODS, THENCE WEST 105.5 FEET, THEN NORTH 6 RODS, THEN WEST 109 FEET TO THE POINT OF BEGINNING.

Tax ID No. 03-089-0035.

(the "Property"). This Property has been generally referred to in this case as the "Brigham City Apartments."

6. On August 10, 2011, prior to the commencement of the above-captioned case, NNU, as trustor, executed a Deed of Trust for the Property in favor of the Kirk Trust, as Beneficiary, which was recorded in the Box Elder County Recorder's Office on August 11, 2011 as Entry No. 304596 (the "Trust Deed"). A copy of the Trust Deed is attached as Exhibit 1 to the Receiver Declaration.

7. Shortly after the Receiver's appointment, the Receiver entered into good faith and arm's length negotiations with the Kirk Trust to work out a settlement with the Kirk Trust related to its Trust Deed and certain claims the Kirk Trust was making in relation to the Property. A settlement agreement, a copy of which is attached to the Receiver's Declaration as Exhibit 2 (the "Initial Agreement"), was executed by the parties, but it was expressly subject to Court

⁹ *Id.* ¶¶ 3, 29, 32-34.

approval.¹⁰

8. The Receiver filed a *Motion (1) to Release Entities From Receivership and (2) to Approve Settlement Agreements*,¹¹ seeking approval of the Initial Agreement, which was denied by the Court.¹²

The Kirk Trust's Intervention in This Case

9. Thereafter, the Kirk Trust sought to intervene in the above-captioned case to enforce its Trust Deed.¹³

10. On January 24, 2013, the Court entered an Order allowing the Kirk Trust to intervene.¹⁴

11. Also on January 24, 2013, the Kirk Trust filed and served its *Complaint in Intervention* (the "Complaint"). The Complaint alleges that the Trust Deed is a valid lien on the Property and that the Kirk Trust is entitled to an order allowing it to foreclose on the Property pursuant to the Trust Deed.¹⁵

12. On February 27, 2013, the Receiver filed an Answer to the Complaint, generally denying the claims of the Kirk Trust, asserting affirmative defenses to the Kirk Trust's claims, including that the Trust Deed is invalid as a matter of law, and asserting a "Counterclaim" against the Kirk Trust, alleging that the Trust Deed is a fraudulent transfer and seeking a

¹⁰ Receiver Declaration at ¶ 6 & Exh. 2 (Settlement Agreement).

¹¹ Docket No. 38.

¹² Docket No. 53.

¹³ Docket No. 89.

¹⁴ Docket No. 137.

¹⁵ Docket No. 138.

declaratory judgment that the Trust Deed is void and invalid.¹⁶

13. After the Kirk Trust intervened in this action and filed its Complaint in Intervention, the Receiver and Kirk Trust recommenced arms' length and good faith negotiations to avoid further litigation, which both parties agreed would be complex, lengthy, and expensive.¹⁷

14. Initially, it appeared that a settlement was not possible, and the parties filed cross motions for summary judgment,¹⁸ which motions were heard by the Court on January 7, 2014, and taken under advisement by the Court.¹⁹

15. Recently, the parties reinitiated settlement discussions. These discussions were conducted at arms' length and in good faith. As a result of these later discussions, the parties entered into the Settlement Agreement, subject to Court approval, a copy of which is attached hereto as **Exhibit B**.²⁰

Certain Issues Related to the Parties' Respective Claims

16. The Property is an apartment complex.

17. Kirk Trust claims to have operated the Property and to have made improvements to the Property (the "Kirk Improvements").

18. Since September 2012, the Receiver has operated the Property through a property manager, made improvements to the Property (the "Receiver Improvements"), and collected rents from the Property (the "Receiver Rents"). The Receiver's property manager has collected

¹⁶ Docket No. 178.

¹⁷ Receiver Declaration at ¶ 7.

¹⁸ Docket Nos. 397 and 399.

¹⁹ Receiver Declaration at ¶ 8.

²⁰ *Id.* at ¶ 9.

security deposits from the tenants of the Property and they are being held in trust (the “Security Deposits”).²¹

19. After the Receiver’s appointment, the Property was involved in a fire and a portion of the improvements to the Property were destroyed by fire. The Receiver made a claim under an applicable insurance policy and has received a total of \$265,412.45 from the insurer under the policy (the “Insurance Proceeds”). Pursuant to an agreement between the Receiver and the Kirk Trust, the Insurance Proceeds are being held in trust by the Kirk Trust’s counsel.²²

20. At this time, there are approximately \$5,000 in real property taxes owed on the Property for the years of 2012 and 2013, and taxes for 2014 are a lien but not yet due.²³

21. The portion of the Property damaged by fire presents certain risks, and has involved the Receiver and the property manager expending time and expense of the Receivership Estate. Furthermore, this portion of the Property is no longer an income producing property. For this reason, the Receiver believes that the best option is to demolish the burned-out structure, but he has not been able to obtain the Kirk Trust’s consent to this action.²⁴

The Settlement Agreement

22. Without altering the Settlement Agreement in any way, the key terms of the Agreement can be described as follows:²⁵

- **Transfer of Property and Treatment of the Insurance Proceeds.** The Receiver agrees to transfer the Property “as is” “where is” to the Kirk

²¹ *Id.* at ¶ 10.

²² *Id.* at ¶ 11.

²³ *Id.* at ¶ 12.

²⁴ *Id.* at ¶ 13.

²⁵ Capitalized terms used in the description of the key terms of the Settlement Agreement, but not defined shall have the meanings ascribed to them in the Settlement Agreement.

Trust pursuant to a special warranty deed within five (5) business days of the entry of a Final Order. The Receiver further agrees that the Kirk Trust may retain the sum of \$85,000.00 from the Insurance Proceeds. The balance of the Insurance Proceeds, totaling \$180,412.45 (the “Estate Proceeds”) shall be transferred to the Receiver within five (5) days of the Final Order. Transfer of the Property and the Estate Proceeds will happen on the Closing Date.²⁶

- **Treatment of Receiver Rents and Security Deposits.** The Receiver shall continue to operate the Property through his property manager and all Receiver Rents attributed to the period on or prior to the Closing Date shall be property of the Receivership Estate and all Receiver Rents attributed to the period after the Closing Date shall be property of the Kirk Trust. The Security Deposits shall be turned over to the Kirk Trust on the Closing Date.²⁷
- **Taxes, Utilities and Insurance.** The Receiver shall pay the 2012 and 2013 taxes. Taxes for 2014 and utilities related to the Property shall be paid by the Receiver and the Kirk Trust pro rata as of the Closing Date.²⁸
- **Release of Claims.** Reciprocal releases of claims by the Receiver and the Kirk Trust as described in the Agreement, which releases include the Receivership Estate’s release of claims related to the Kirk Improvements and the Kirk Rents, and the Kirk Trust’s release of any right to a distribution of Receivership Estate assets.²⁹
- **Dismissal of Lawsuit.** The Kirk Trust will dismiss its Complaint with prejudice and the Receiver will dismiss his Counterclaim with prejudice. This relief will be sought as part of this Motion.³⁰
- **Subject to Court Approval.** The Agreement must be approved by the Court.³¹

²⁶ Exh. B (Settlement Agreement ¶2).

²⁷ Exh. B (Settlement Agreement ¶ 3).

²⁸ Exh. B (Settlement Agreement ¶ 3).

²⁹ Exh. B (Settlement Agreement ¶¶ 4-5).

³⁰ Exh. B (Settlement Agreement ¶ 8).

³¹ Exh. B (Settlement Agreement ¶ 1).

III.

ARGUMENT

The Receiver requests that the Court enter an Order granting this Motion, thus approving the Settlement Agreement. Approval of the Settlement Agreement is within this Court's power, and it is appropriate in this case because the Settlement Agreement is, in the Receiver's business judgment, in the best interests of the Receivership Estate.

This Court has broad "broad powers" and "wide discretion" to oversee and determine relief in an equity receivership.³² The Court also 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.³³ In turn, the Receiver's focus is "to safeguard the [Receivership] assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets."³⁴

Consistent with his obligations, the Receiver conducted an extensive investigation of the Trust Deed, the Kirk Trust's alleged claims against the Receivership Estate and the Property, and the Receivership Estate's claims against the Kirk Trust and in the Property.³⁵ Based on that investigation, the Receiver has concluded that he has valid claims against the Kirk Trust and the Property, and valid defenses to the Kirk Trust's claims.³⁶ However, continuing litigation over

³² 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.").

³³ See *id.*

³⁴ *Id.* (internal citations and quotations omitted).

³⁵ Receiver Declaration at ¶ 14.

³⁶ *Id.* at ¶ 15.

the validity of the parties' respective claims and interests will be expensive and lengthy, and as in any litigation, is subject to risk. Thus, the Receiver has entered into good faith and arms' length negotiations with the Kirk Trust to settle the parties' respective disputes.³⁷ The Agreement that has been reached is, in the Receiver's business judgment, appropriate and in the best interests of the Receivership Estate.³⁸ Through the Agreement, the Kirk Trust's intervention action will be dismissed, the complex litigation will cease, and Receivership Estate will, among other things, (a) obtain over \$180,000 from the Insurance Proceeds, (b) retain all of the Receiver Rents that were collected during the Receiver's operation of the Property, and (c) obtain a release as to all claims that the Kirk Trust could assert against the Receivership Estate, including any right to distribution as an NNU investor.³⁹ Furthermore, the Receiver sees the Agreement as a benefit because he will no longer have to invest time and Receivership Estate resources associated with securing the portion of the Property damaged in the fire, oversee the demolition of this portion of the Property which is no longer an income producing property for the Estate, or face liability risks from the continued presence of the burned structure.⁴⁰

IV.

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 (a) approving the terms of the Agreement; (b) authorizing the Receiver to transfer the Property "as is" "where is" to the Kirk Trust pursuant a special warranty deed; (c) authorizing the Receiver to make the payments

³⁷ *Id.* at ¶ 16.

³⁸ *Id.* at ¶ 17.

³⁹ *See* Exh. B (Settlement Agreement).

⁴⁰ Receiver Declaration at ¶ 18.

necessary on the Property to effectuate the Agreement, and (d) dismissing the Kirk Trust's Complaint and the Receiver's Counterclaim.

RESPECTFULLY SUBMITTED this 18th day of August, 2014.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt

Chris Martinez

Jeffrey M. Armington

Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION TO APPROVE AGREEMENT BETWEEN RECEIVER AND THE TRUE & MARJORIE KIRK FAMILY TRUST, AND MEMORANDUM IN SUPPORT** (the "Motion") was filed with the Court on this 18th day of August, 2014, 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 18th day of August, 2014, the Motion was served on the following parties by U.S. Mail postage prepaid:

Wayne L. Palmer
8816 South 2240 West
West Jordan, UT 84088

Finally, I certify that on that on the 18th day of August, 2014, the Motion was served on the following parties by email:

Laura S. Scott
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
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(lscott@parsonsbehle.com)

Attorneys for the Kirk Trust

/s/ Candy Long
Candy Long