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

**(Lei Chen and Shaowei Wan; Chris
Cleveland; Larry and Evy Lofthouse;
Lynn Livingston and the Estate of
LaVon H. Livingston; Isaac and Lesley
Bickmore and Steven and Dana
Bickmore; Catherine Noyes; and
Theodore Fuller and the Fuller Family
Foundation)**

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 or lawsuits filed upon lack of response to demand, the Receiver has entered into seven Settlement

⁵ *Id.* at ¶ 7(C).

⁶ *Id.* at ¶ 7(D).

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 7(J).

⁹ Declaration of Receiver R. Wayne Klein in Support of Receiver’s Second Motion and Memorandum in Support Requesting Order Approving Settlement Agreements (“Receiver Declaration”) ¶ 3, filed concurrently herewith.

Agreements and Releases with certain parties.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 further 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. Chen. On June 13, 2013, the Receiver filed a lawsuit against Lei Chen and Shaowei Wan (collectively, "Chen"), a married couple who were NNU investors, asserting that Chen received interest over and above their respective principal investments in the total amount of \$21,769.32. On July 18, 2013, the Receiver entered into a Settlement Agreement and Release with Chen under which Chen will repay the full amount of interest in the amount of \$21,769.32 to the Receiver for the benefit of the Receivership Estate. Chen has paid \$10,000.00 of this amount, with the balance being due by no later than December 31, 2013.¹² Upon payment of the full amount owed under the Settlement Agreement, the Receiver will file a notice of dismissal of the lawsuit against Chen.

b. Cleveland: The Receiver has alleged that NNU investor Chris Cleveland ("Cleveland") was paid \$2,413.07 over and above his principal investment, and made a demand on him for a return of these funds. Cleveland, in turn, asserted that he was unable to pay the amount demanded, and provided the Receiver with a verified financial statement related to this

¹⁰ Receiver Declaration ¶ 4.

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

claim. Based on this information, on July 23, 2013, the Receiver entered into a Settlement Agreement and Release with Cleveland under which Cleveland will pay \$1,000.00 to the Receiver for the benefit of the Receivership Estate. Cleveland has paid \$250.00 of the total settlement amount, and will repay the balance by no later than November 1, 2013.¹³

c. Lofthouse: On June 21, 2013, the Receiver filed a lawsuit against NNU investors Larry and Evy Lofthouse (collectively, "Lofthouse"), asserting that Lofthouse received \$84,062.66 over and above the amount of their principal investments. Lofthouse has asserted that it does not have the ability to pay this sum to the Receivership Estate, and has provided the Receiver with a verified financial statement related to this claim. Based on this information, on July 23, 2013, the Receiver entered into a Settlement Agreement and Release with Lofthouse under which Lofthouse has paid \$8,406.26 to the Receiver for the benefit of the Receivership Estate. Upon approval of the Settlement Agreement by the Court, the Receiver will dismiss the lawsuit against Lofthouse.¹⁴

d. Livingston: On June 17, 2013, the Receiver filed a complaint against NNU investor LaVon Livingston ("LaVon"), seeking the return of \$6,199.83 in excess profits. The Receiver was then contacted by LaVon's son, NNU investor Lynn Livingston ("Lynn"), who informed the Receiver that LaVon died in 2007 and that her interests in National Note were distributed to her three children. Lynn provided information to the Receiver showing that he in fact lost \$27,000.00 of his principal investment, and that a large portion of LaVon's overpayment consisted of transferring her interests in an existing account at National Note, rather than being paid out in cash. On August 8, 2013, the Receiver entered into a Settlement Agreement and

¹³ Receiver Declaration ¶ 7.

¹⁴ Receiver Declaration ¶ 8.

Release with Lynn and the Estate of LaVon pursuant to which the lawsuit will be dismissed and these parties agree not to assert any claims against the Receivership Estate.¹⁵

e. Bickmore: On June 21, 2013, the Receiver filed a complaint against NNU investors Isaac and Lesley Bickmore (collectively, "I. Bickmore"), asserting that I. Bickmore received \$13,552.06 over and above their principal investments. Steven and Dana Bickmore (collectively, "S. Bickmore" and together with I. Bickmore, the "Bickmores"), close relatives of I. Bickmore, lost \$38,236.99 of their principal investment. On August 13, 2013, the Receiver entered into a Settlement Agreement and Release with the Bickmores under which (a) S. Bickmore waives any claim they may have against the Receivership Estate for the \$38,236.99 in net principal loss, and (b) I. Bickmore has paid to the Receivership Estate \$6,000.00 to settle claims asserted in the lawsuit. Upon approval of the Settlement Agreement by the Court, the Receiver will file a notice of dismissal of the lawsuit against I. Bickmore.¹⁶

f. Noyes: On June 7, 2013, the Receiver filed a complaint against NNU investor Catherine Noyes ("Noyes"), alleging that Noyes received \$15,000.00 over and above her principal investment. Subsequent to the filing of the lawsuit, the Receiver discovered that Noyes was overpaid an additional \$5,364.05 under the name Catherine Winters. On August 21, 2013, the Receiver entered into a Settlement Agreement and Release with Noyes under which Noyes has paid the Receivership Estate the total amount of false profits she received—\$20,364.05. Upon approval of the Settlement Agreement by the Court, the Receiver will cause a notice of dismissal to be filed to dismiss the lawsuit against Noyes.¹⁷

g. Fuller. On June 13, 2013, the Receiver filed a lawsuit against NNU

¹⁵ Receiver Declaration ¶ 9.

¹⁶ Receiver Declaration ¶ 10.

¹⁷ Receiver Declaration ¶ 11.

investors Theodore Fuller and the Fuller Family Foundation (collectively, “Fuller”), alleging that Fuller had received a total of \$49,056.48 over and above their principal investments. On August, 22, 2013, the Receiver entered into a Settlement Agreement and Release with Fuller under which Fuller has paid \$49,056.48 to the Receivership Estate in exchange for a mutual release of claims. Upon approval of this Settlement Agreement by the Court, the Receiver will cause a notice of dismissal to be filed to dismiss the lawsuit against Fuller.¹⁸

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

¹⁸ Receiver Declaration ¶ 12.

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 and Release 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.¹⁹

10. In the case of the Settlement Agreements and Releases with Chen, Noyes, and Fuller, the Receivership Estate will obtain full recovery of overpaid funds either in lump sum or over time in exchange for a release of claims.²⁰

11. In the case of the Settlement Agreements and Releases with Cleveland, Lofthouse, and I. Bickmore, the Receivership Estate will receive less than the full amount of false profits received by these parties because they have provide the Receiver with financial information showing that any judgment against them may be difficult if not impossible to recover. 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

¹⁹ Receiver Declaration ¶ 13.

²⁰ Receiver Declaration ¶ 14.

the Settlement Agreements and Releases are fair, reasonable and adequate.²¹

12. In the case of the Settlement Agreements and Releases with Livingston and the Bickmores, the Receivership Estate will receive a full release of claims and actions that these parties—and relatives of these parties—might have against the Receivership Estate. Based on the Receiver’s analysis of the potential adverse claims, he believes Lynn Livingston could assert a claim for \$27,000.00 and S. Bickmore could assert a claim for \$38,236.99, for a total amount of \$65,236.99 in released claims. The Receiver has determined in his business judgment that reduction in the amount that can be claimed by the Livingston parties and S. Bickmore is fair, reasonable, and adequate in light of the amount of overpayment to other accounts held by Livingston and I. Bickmore.²²

13. Together, these Settlement Agreements and Releases will result in the payment of over \$105,000.00 to the Receivership Estate.²³

14. Each of the Settlement Agreements and Releases was negotiated fairly and honestly, and is the result of an arm’s length transaction. There has been no collusion between the parties.²⁴

15. In light of these factors, the Receiver believes these settlement agreements are just and fair and should be approved.

²¹ Receiver Declaration ¶ 15.

²² Receiver Declaration ¶ 16.

²³ Receiver Declaration ¶ 17.

²⁴ Receiver Declaration ¶ 18.

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 and Releases described above.

DATED this 28th day of August, 2013.

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 FOURTH MOTION AND MEMORANDUM IN SUPPORT REQUESTING ORDER APPROVING SETTLEMENT AGREEMENTS** (the "Motion") was filed with the Court on this 28th day of August, 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 28th day of August, 2013, the Motion was served on the following parties by electronic mail:

Lei Chen and Shaowei Wan
1635 Crater Court
Reno, NV 89521

Chris Cleveland
8945 South 2240 West
West Jordan, UT 84088

Larry and Evy Lofthouse
248 East 13800 South, #42
Draper, UT 84020

Lynn Livingston and the Estate
Of LaVon Livingston
759 Catherine Street
Salt Lake City, UT 84116

Isaac and Lesley Bickmore
3889 Glen Hill Drive
West Valley City, UT 84120

Steven and Dana Bickmore
550 Castle Kirk Drive
Baton Rouge, LA 70808

Catherine Noyes
376 Crestline Circle
Salt Lake City, UT 84103

Theodore Fuller and the Fuller
Family Foundation
PO Box 4801
Incline Village, NV 89450-4801

/s/ Jeffrey M. Armington