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*Attorneys for Court-Appointed Receiver R. Wayne Klein*

**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, an individual,</p> <p style="text-align: right;">Defendants.</p>	<p><b>RECEIVER'S NINTH MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENTS AND MEMORANDUM IN SUPPORT</b></p> <p><b>(Anthony Fenison; American Express Travel Related Services Company, Inc., and American Express Company, Inc; and Glendale Eaton and the GM and CR Eaton Living Trust)</b></p> <p style="text-align: center;">2:12-cv-00591 BSJ</p> <p style="text-align: center;">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, 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 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”).<sup>1</sup> 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.<sup>2</sup>

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 . . . [.]”<sup>3</sup>
- “[T]ake custody, control and possession of all Receivership Property and records. . . [.]”<sup>4</sup>

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<sup>1</sup> Docket No. 9 (Receivership Order).

<sup>2</sup> *See generally, id.*

<sup>3</sup> *Id.* at ¶ 7(A).

<sup>4</sup> *Id.* at ¶ 7(B).

- “[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[.]”<sup>5</sup>
- “[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[.]”<sup>6</sup>
- “[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.”<sup>7</sup>
- “[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[.]”<sup>8</sup>

## 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 these parties’ dealings with the Receivership Defendants prior to his appointment.<sup>9</sup>

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 demands made and lawsuits filed, the Receiver has entered into numerous settlement agreements, including the three

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<sup>5</sup> *Id.* at ¶ 7(C).

<sup>6</sup> *Id.* at ¶ 7(D).

<sup>7</sup> *Id.* at ¶ 37.

<sup>8</sup> *Id.* at ¶ 7(J).

<sup>9</sup> Receiver Declaration ¶ 3.

Settlement Agreements and Releases that are the subject of this Motion.<sup>10</sup> Each Settlement Agreement and Release (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 the collection of funds for the benefit of the Receivership Estate and/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.<sup>11</sup>

5. Each Settlement Agreement and Release subject to the present Motion, all of which are subject to Court approval, are described as follows:

a. Anthony Fenison.: On June 6, 2013, the Receiver filed suit against Anthony Fenison ("Fenison"), alleging that Fenison was an NNU investor who received a total of \$25,290.04 in excess of his principal investment with NNU. Fenison thereafter provided information to the Receiver showing financial difficulty in repaying the full amount of the overpayment. Based thereon, on May 30, 2014, the Receiver entered into a Settlement Agreement and Release with Fenison, subject to Court approval, agreeing in part to compromise the Receivership Estate's claim against Fenison. Under the Agreement, Fenison will pay \$23,000.00 to the Receivership Estate. Fenison has already paid \$10,000, with the balance due by June 14, 2015. The parties have also agreed to mutual releases.<sup>12</sup>

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<sup>10</sup> Receiver Declaration ¶ 4.

<sup>11</sup> Receiver Declaration ¶ 5.

<sup>12</sup> Receiver Declaration ¶ 6.

b. American Express Travel Related Services Company, Inc., and American Express Company, Inc.: On June 24, 2013, the Receiver filed suit against these two American Express companies (collectively, "American Express"), alleging that American Express received over \$1.3 million in payments from NNU and Palmer. American Express disputed any liability and provided information showing that approximately \$665,224.26 was paid by NNU on account of American Express accounts in Palmer's name and it also alleged that some of those payments were for business purposes of NNU. Based thereon, on August 20, 2014, the Receiver entered into a Settlement Agreement and Release with American Express, subject to Court approval, agreeing in part to compromise the Receivership Estate's claim against American Express. Under the Agreement, American Express will pay \$640,000.00 to the Receivership Estate. This amount will be paid within thirty days after approval of the settlement by the Court. The parties have also agreed to mutual releases.<sup>13</sup>

c. Glendale M. Eaton and the GM & CR Eaton Living Trust: On June 13, 2013, the Receiver filed suit against Glendale M. Eaton and the GM & CR Eaton Living Trust (collectively, "Eaton"), alleging that Eaton was an NNU investor who received a total of \$12,091.78 in excess of its principal investment with NNU. The Receiver also sought a declaratory judgment that an Assignment of Beneficial Interest ("ABI") that Eaton had obtained was invalid. On August 22, 2014, the Receiver entered into a Settlement Agreement and Release with Eaton, subject to Court approval, agreeing in part to compromise the Receivership Estate's claims against Eaton. Under the Agreement, Eaton will pay \$10,000.00 to the Receivership

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<sup>13</sup> Receiver Declaration ¶ 7.

Estate and release the ABI. The \$10,00.00 will be paid within ten days of the Court's approval of the agreement. The parties have also agreed to mutual releases.<sup>14</sup>

### III.

#### APPLICABLE LAW AND ANALYSIS

6. The Receiver requests that the Court approve the above-described Settlement Agreements and Releases. 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."<sup>15</sup>

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."<sup>16</sup> 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 expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.<sup>17</sup>

9. Each Settlement Agreement 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

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<sup>14</sup> Receiver Declaration ¶ 8.

<sup>15</sup> *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)).

<sup>16</sup> *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).

<sup>17</sup> *Jones*, 741 F.2d at 324.

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, 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.<sup>18</sup>

10. The Receiver, in an exercise of his business judgment, has determined that each Settlement Agreement and Release is in the best interest of the Receivership Estate taking into account (a) the information that he has been provided related to each of the Defendants and the facts surrounding their transactions with NNU and/or their ability to pay a potential judgment, (b) potential claims that may exist against the Receivership Estate, and/or (c) the inherent risks, costs and delay associated with litigation and collection.<sup>19</sup>

11. Together, the Settlement Agreements and Releases will result in the payment of \$673,000.00 to the Receivership Estate. These settlements also will allow the Receiver to avoid expending additional time and legal fees pursuing litigation which will reduce the net result of any judgment that may be obtained.<sup>20</sup>

12. Each Settlement Agreement and Release was negotiated fairly and honestly, and is the result of an arm's-length transaction. There has been no collusion between the parties.<sup>21</sup>

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<sup>18</sup> Receiver Declaration ¶¶ 9-10.

<sup>19</sup> Receiver Declaration ¶ 11.

<sup>20</sup> Receiver Declaration ¶ 12.

<sup>21</sup> Receiver Declaration ¶ 13.

13. In light of these factors, the Receiver believes each Settlement Agreement and Release is just and fair and should be approved.<sup>22</sup>

**IV.**

**CONCLUSION**

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit A**, approving each Settlement Agreement and Release described above.

DATED this 28th day of August, 2014.

**DORSEY & WHITNEY LLP**

/s/ Peggy Hunt

Peggy Hunt

Chris Martinez

Jeffrey M. Armington

*Attorneys for Receiver*

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<sup>22</sup> Receiver Declaration ¶ 14.



**CERTIFICATE OF SERVICE**

I hereby certify that service of the above **RECEIVER'S NINTH MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENTS AND MEMORANDUM IN SUPPORT (ANTHONY FENISON; AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., AND AMERICAN EXPRESS COMPANY, INC; AND GLENDALE EATON AND THE GM AND CR EATON LIVING TRUST)** (the "Motion") was filed with the Court on this 28th 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 28th day of August 2014, the Motion was served on the following parties by electronic mail or US Mail:

Wayne LaMar Palmer  
8816 South 2240 West  
West Jordan, UT 84008

Anthony Fenison,  
c/o Andrew Pongracz, Esq.  
andrew@pongaczlaw.com

American Express Travel Related Services Company, Inc.  
American Express Company, Inc.  
c/o Frank White, Esq.  
Frank.White@agg.com

Glendale M. Eaton  
GM and CR Eaton Living Trust  
c/o Scot Boyd, Esq.  
scot.boyd@chrisjen.com

/s/ Jeffrey M. Armington