Peggy Hunt (Utah State Bar No. 6060)
Chris Martinez (Utah State Bar No. 11152)
Sarah Goldberg (Utah State Bar No. 13222)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Facsimile: (801) 933-7373
Email: hunt.peggy@dorsey.com
martinez.chris@dorsey.com
goldberg.sarah@dorsey.com

Attorneys for Court-Appointed Receiver R. Wayne Klein

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, an individual, Defendants.	**RECEIVER'S RESPONSE TO PALMER'S MOTION TO UNFREEZE ASSETS TO PAY ATTORNEY FEES AND TO RETAIN EXPERT WITNESSES** 2:12-cv-00591 BSJ The Honorable Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver in the above-captioned case (the "Receiver"), by and through his counsel, respectfully submits this response to *Motion to Unfreeze Assets to Pay Attorney Fees and to Retain Expert Witnesses and Supporting Memorandum* (the "Motion") filed by Wayne LaMar Palmer ("Palmer").

FACTUAL 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 Palmer, and in conjunction therewith, the Court entered in relevant part, an Order Appointing Receiver and Staying Litigation (the "Receivership Order"). Pursuant to the Receivership Order, the Receiver was appointed and NNU and 41 of its affiliated companies (collectively, "National Note") and all Palmer's assets were placed in the Receiver's control. The Court also froze all assets of Palmer and National Note.[1]

2. On August 17, 2012, Palmer stipulated to entry of preliminary injunction orders against him and NNU (the "Preliminary Injunction Orders").[2] Under the Preliminary Injunction Orders, "all receivership assets and recoverable assets and assets related to the conduct alleged in the Complaint belonging to Palmer [and NNU] shall remain frozen."[3]

3. Since the inception of this case, Palmer has hired three separate sets of attorneys to represent him.[4] Palmer contends that each set of attorneys withdrew in part because Palmer was unable to continue paying their legal fees.[5] This is the first time that Palmer or any counsel has sought to modify the Preliminary Injunction Orders to unfreeze assets to pay for his legal defense.

4. Based on the assets that the Receiver has recovered to date, there is currently approximately a total of $1,330,852.53 of unrestricted cash in the Receivership Estate. Of this

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[1] Docket No. 9.

[2] Docket Nos. 45 & 46.

[3] *Id.*

[4] *Declaration of Wayne L. Palmer*, Docket No. 845-1, at ¶¶ 3-9.

[5] *Id.*

amount a mere $8.84 has come from Palmer's personal assets—the funds that were on deposit in his bank account at the time of the asset freeze. All other funds are a result of the liquidation of the assets of National Note.

5. The Receiver has abandoned some of Palmer's assets to him, including his home. The Court allowed Palmer to retain temporary possession over other assets, including vehicles and certain personal property. To the best of the Receiver's information and belief, Palmer has been living in his home without making any mortgage payments since prior to the commencement of this case.

6. As of this date, the Receiver does not anticipate that there will be sufficient funds from the liquidation to fully compensate the investors.

7. Multiple investors have told the Receiver that they oppose the Motion and do not believe that Palmer should be able to use assets of the Receivership Estate, which are derived from National Note's assets—not Palmer's assets—to pay his legal fees.[6]

RELEVANT LEGAL AUTHORITY

It is well established that "[a] defendant in a case brought by the SEC may not use income derived from alleged violations of the securities laws to pay for legal counsel."[7] "Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime."[8]

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[6] Samples of two written communications from investors to the Receiver are attached as Exhibits A & B.

[7] *SEC v. Roor*, No. 99 Civ. 3372, 1999 WL 553823, at * 3 (S.D.N.Y. July 29, 1999).

[8] *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993) (citations omitted); *accord SEC v. Coates*, No. 94 Civ. 5361, 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994) ("A defendant is not entitled to foot his legal bill with funds that

"To persuade a court to unfreeze assets, the defendant must establish [1] that the funds he seeks to release are untainted and [2] that there are sufficient funds to satisfy any disgorgement remedy that might be ordered in the event a violation is established at trial."[9] Even if a defendant satisfies this burden, "[g]iven that the funds released are, in effect, coming out of the pockets of defrauded investors, it is appropriate for the court to consider whether the funds are necessary."[10]

ANALYSIS

The Receiver respectfully submits that the Court should not unfreeze assets of the Receivership Estate that derived from monies provided by investors for Palmer to use in his legal defense for three primary reasons.

First, unfreezing assets for this purpose would be an improper use of the liquidation proceeds from the assets of National Note (not Palmer). At this point, only $8.84 of the Receivership Estate's total liquidation proceeds are attributed to *Palmer's* personal assets. Palmer should not be allowed to use corporate assets to pay his personal expenses.

Second, granting the Motion would be inequitable and unfair to the NNU investors. This is especially true in light of the fact that (a) investors in this case will not be made whole, and (b) in the over two years since the SEC commenced this case, Palmer has not been employed and

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are tainted by his fraud.").

[9] *S.E.C. v. Stein*, No 07 Civ. 3125, 2009 WL 1181061, at *1 (S.D.N.Y. Apr. 20, 2009).

[10] *See S.E.C. v. FTC Capital Markets, Inc.*, No. 09 Civ. 4755, 2010 WL 2652405, at *9-10 (holding that defendant demonstrated a need for the release of funds, but had failed to justify the release of $100,000 in addition to the $60,000 that may already have been paid to defense counsel); *SEC v. Roor*, No. 99 Civ. 3372, 1999 WL 553823, at *3 (S.D.N.Y. July 29, 1999) (refusing to unfreeze access to the defendant's home equity line of credit even though the equity in the home was not the proceeds of the fraud because the defendant would "soon have significant personal liabilities to the government and to the victims of the fraud he is alleged to have perpetrated.").

has been living in his home without making mortgage payments. Like any civil defendant, Palmer should fund his own defense in civil matters.

Third, the Motion is untimely. Palmer stipulated to the entry of the Preliminary Injunction Orders over two years ago. He should not be able to reverse course—breaking his own stipulation—and ask for the Court to release assets that would otherwise go to refund investors to pay for his legal defense.

It should be noted that the cases cited by Palmer do not support his argument. In *SEC v. Dowdell*,[11] the court released frozen assets so that the defendant could defend against the SEC's preliminary injunction motion. Here, Palmer stipulated to the Preliminary Injunction Order over two years ago. Accordingly, *Dowdell* does not apply. And, in *SEC v. Ducland Gonzalez de Castilla*,[12] the court granted the defendant's motion to release frozen assets to pay defendant's legal fees, but only because it had previously determined that the SEC failed to sustain its burden of proving that the defendant had engaged in insider trading and therefore denied the SEC's motion seeking an order preliminarily enjoining the defendants from violating securities laws in the future.[13] This is not the case here. In the other cases that Palmer cites, *SEC v. Quinn*[14] and *SEC v. International Loan Network*,[15] while the courts noted that they had previously modified the asset freeze order, the opinions do not discuss the issue and there is no discussion of the

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[11] 175 F.Supp.3d 850 (W.D. W. Va. 2001).

[12] 170 F.Supp.2d 427 (S.D.N.Y. 2001).

[13] *Id*. at 430.

[14] 997 F.2d 287 (7th Cir. 1993).

[15] 770 F.Supp. 678 (D.D.C. 1991).

reasons for the previous modifications.

Palmer's due process argument also fails. He argues that he is being deprived of the right to be heard in his defense because he cannot hire counsel. The Seventh Circuit has already rejected this argument in *SEC v. Cherif*.[16] In rejecting a similar argument, the court stated that "[a] criminal defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney. It would be anomalous to hold that a civil litigant has any superior right to counsel than one who stands accused of a crime."[17]

CONCLUSION

For the reasons expressed herein, the Court should deny Palmer's Motion.

DATED this 23rd day of January, 2015.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Sarah Goldberg
Attorneys for R. Wayne Klein, Receiver

[16] 933 F.2d 403, 417 (7th Cir. 1991).

[17] *Id.* (citation and quotation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, I filed the **RECEIVER'S RESPONSE TO PALMER'S MOTION TO UNFREEZE ASSETS TO PAY ATTORNEY FEES AND TO RETAIN EXPERT WITNESSES** with the Court using the CM/ECF system and served it via U.S. Mail, postage prepaid upon the following:

Monte N. Stewart
Daniel W. Bower
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 1000
Boise, Idaho 83713

/s/ *Suanna Armitage*