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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.

**RECEIVER'S AMENDED MOTION
REQUESTING ORDER APPROVING
SALE OF PROPERTIES FREE AND
CLEAR OF INTERESTS AND
MEMORANDUM IN SUPPORT**

(ALMOND HEIGHTS LOTS 21 & 22)

Civil No. 2:12-00591

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 of record and pursuant to 28 U.S.C. §§ 2001(b) and the *Order Appointing Receiver and Staying Litigation* entered by this court in this case, hereby files this amended motion (the "Amended 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 Properties."

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

“Amended 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
- “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

¹ Docket No. 9 (Receivership Order).

² See generally, *id.*

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

⁵ *Id.* at ¶ 7(D).

- “[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

II.

REAL PROPERTY TO BE SOLD

Almond Heights Lots 21 & 22

3. Since his appointment, the Receiver has identified numerous real properties as being part of the Receivership Estate, and where appropriate has listed such properties for sale.¹⁰

4. Relevant to this Motion are two parcels of real property located in the Almond Heights Park subdivision in Toquerville, Utah, with the following addresses and tax parcel numbers:

- 815 South Peachtree Drive, Toquerville, UT 84774; T-AHP-A-21 (“Lot 21”); and

⁶ *Id.* at ¶ 19.

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 38.

⁹ *Id.* at ¶ 39.

¹⁰ Amended Receiver Declaration ¶ 5.

- 819 South Peachtree Drive, Toquerville, UT 84774; T-AHP-A-22 (“Lot 22”); together with Lot 21, “Lots 21 and 22” or the “Properties”).

5. The Receiver obtained Title Reports for the Properties, copies of which are attached to the Amended Receiver Declaration as Exhibit A (the “Title Reports”).¹¹ According to the Title Report, the Properties are titled in the name of NNU.

Marketing the Properties

6. On or about July 22, 2016, the Receiver caused the Properties’ listing to be renewed for sale through Access Utah Realty (the “Realtor”).¹² A copy of the “Listing Agreement” is attached to the Amended Receiver Declaration as Exhibit B.

7. The Receiver marketed the Properties for sale through the Realtor, including by listing the Properties on the Multiple Listing Service.¹³

Court-Appointed Appraisers and Valuation

8. To determine an offering price and comply with his duties, the Receiver obtained the opinion of his Realtor, three court-appointed appraisers, and a civil engineering firm.¹⁴

9. On October 3, 2014, the Court entered an *Order Granting Receiver’s Ex Parte Motion Seeking Appointment of Appraisers for Almond Heights Lots*.¹⁵

10. Consequently, Craig Morley (“Morley”), Steven R. Williams (“Williams”), and Kelly J. Blake (“Blake”) were appointed as appraisers for the Receivership Estate’s Toquerville

¹¹ *Id.* at ¶ 6.

¹² *Id.* at ¶ 7.

¹³ *Id.* at ¶ 8.

¹⁴ *Id.* at ¶ 9.

¹⁵ Docket No. 780.

properties, including Lots 21 and 22 (collectively, the “Appraisers”).¹⁶ The Appraisers provided the Receiver with appraisals of the Receivership Estate’s Toquerville properties, including Lots 21 and 22, in late 2014 (the “2014 Appraisals”).¹⁷ True and correct copies of the portions of the 2014 Appraisals that are relevant to the Properties are attached to the Amended Receiver Declaration as Exhibit C.

11. The 2014 Appraisals appraised Lot 21 at an average of \$12,333.33 and Lot 22 at an average of \$13,333.33, giving the Properties a total appraised value of \$25,666.66 in 2014.

12. By the fall of 2016, the Receiver had sold all of the Receivership Estate’s properties in the Almond Heights Park subdivision except for Lots 21 and 22. The Properties failed to sell at any price near the 2014 Appraisal values because Lots 21 and 22 abut against a steep ravine, and potential buyers were concerned that they would not be able to build homes on the Properties. Photographs showing the precipitous drop off at the back of the Properties are attached to the Amended Receiver’s Declaration as Exhibit D.¹⁸

13. Due to these concerns, the Receiver engaged a civil engineering firm, Pratt Engineering, P.C. (“Pratt”), to perform a topographical survey of the Properties and assess the feasibility of building homes on either of them. On or about October 14, 2016, Pratt returned its “Topographic Survey,” which concluded that building on Lot 22 would be impossible and building on Lot 21 would most likely be cost-prohibitive. A true and correct copy of the relevant portions of the Topographic Survey is attached to the Amended Receiver Declaration as Exhibit E.¹⁹

¹⁶ *Id.* at 1-2.

¹⁷ Amended Receiver Declaration ¶ 10.

¹⁸ *Id.* at ¶ 11

¹⁹ *Id.* at ¶ 12

14. After receiving the Topographic Survey, the Receiver asked Morley to re-appraise Lots 21 and 22, which Morley did on November 15, 2016 (the “2016 Morley Appraisals”). True and correct copies of the 2016 Morley Appraisals are attached to the Amended Receiver Declaration as Exhibit F.²⁰

15. Morley re-appraised Lot 21 at \$7,500.00²¹ and Lot 22 at \$4,000.00.²² The total re-appraised value of the Properties is \$11,500.00 (the “Re-appraised Value”).

16. On or about December 8, 2016, the Receiver sent copies of the 2016 Morley Appraisals to the Washington County Assessor’s office, asking if the assessed values of the Properties will be adjusted to reflect the valuations of Pratt and Morley. The Washington County Assessor responded that the values of the Properties have been adjusted to amounts similar to the Re-appraised Value. A true and correct copy of the Receiver’s correspondence with the Washington County Assessor’s office is attached to the Amended Receiver Declaration as Exhibit G.²³

17. Based on the Topographic Survey from Pratt, the 2016 Morley Appraisal, and the conclusions of the Washington County Assessor, the Receiver believes that the Re-appraised Value of the Properties represents the true market and appraisal value of the Properties.²⁴

The Purchase Agreement

18. The Receiver has entered into a “Purchase Agreement” to sell the Properties. On or about July 26, 2017, the Receiver entered into a purchase agreement on behalf of the

²⁰ *Id.* at ¶ 13.

²¹ Amended Receiver Declaration, Exh. F (2016 Morley Appraisals).

²² *Id.*

²³ Amended Receiver Declaration ¶ 14.

²⁴ *Id.* at ¶ 15.

Receivership Estate with Thomas Belchak (the “Buyer”). On or about December 15, 2016, the Receiver and the Buyer agreed to a purchase price of \$7,700.00, pursuant to the terms of the Purchase Agreement and subject to Court approval. A copy of the Purchase Agreement is attached to the Amended Receiver Declaration as Exhibit H.²⁵

19. The Purchase Agreement was negotiated by the Receiver and the Buyer in good faith and at arms’ length.²⁶

20. The Buyer must close the sale by January 20, 2017. Accordingly, the Receiver requests that the Court schedule a hearing to approve this Amended Motion before January 20, 2017.²⁷

Sale Costs and Net Sale Proceeds

21. The Receiver anticipates paying at the time of the closing of the sale of the Properties outstanding property taxes and the ordinary costs of sale, including market-rate closing costs and a standard 7.00% realtor commission. The gross sale proceeds, less the costs of sale, taxes, and commission are referred to herein as the “Net Sale Proceeds.”²⁸

22. Any other financial interests against the Properties (to the extent they exist and without any waiver of the Receiver’s or the Receivership Estate’s rights and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds.²⁹

23. The Receiver will separately account to the Court for the Net Sale Proceeds

²⁵ *Id.* at ¶ 16.

²⁶ *Id.* at ¶ 17.

²⁷ *Id.* at ¶ 18.

²⁸ *Id.* at ¶ 19.

²⁹ *Id.* at ¶ 20.

pending resolution of any disputes related to interests that may exist against the Properties.³⁰

Free and Clear Sale

24. The Receiver proposes to sell the Properties 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 Properties or the Net Sale Proceeds.³¹

25. To determine interests, if any, against the Properties, the Receiver obtained the Title Report and tax notices for the Property from Washington County (the “Tax Notices”). A copy of the Tax Notices is attached to the Amended Receiver Declaration as Exhibit I.³²

26. From the Title Report and the Tax Notices, the Receiver determined that property taxes for 2011 through 2015 are liens that are due and payable, property taxes for 2016 are liens that not yet due and payable, and that no other liens or interests attach to the Property.³³

27. Any other financial interests against the Property, other than property taxes and closing costs, will not be paid at the time of closing of the sale. Rather, any such interests (to the extent they exist and without any waiver of the Receiver’s or the Receivership Estate’s right and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds.³⁴

28. A copy of this Motion is being served on the relevant taxing authority.³⁵

Best Interests

29. The Receiver believes that the sale of the Properties as proposed is beneficial for

³⁰ *Id.* at ¶ 21.

³¹ *Id.* at ¶ 22.

³² *Id.* at ¶¶ 6 and 23.

³³ *Id.* at ¶ 24, Exh. A (Title Report), and Exh. I (Tax Notice).

³⁴ *Id.* at ¶ 25.

³⁵ *Id.* at ¶ 26.

and in the best interests of the Receivership Estate based on the particular conditions of Lots 21 and 22, the Topographic Survey, and the 2016 Morley Appraisals.³⁶

30. The Properties abut a steep ravine, leaving little or no space on which to build homes.³⁷ In the Topographic Survey, Pratt concluded that building on Lot 22 would be impossible. According to the Topographic Survey, “[a]lthough creative design and extensive engineering is not uncommon in parts of the world to build almost anywhere, Lot 22 would not be a feasible lot to build upon. Typical community safety requirements on building setbacks from abrupt edges (cliffs) is [sic] 30 feet, leaving little to no buildable area on Lot 22.”³⁸

31. Additionally, Pratt concluded that, while it was possible to construct a home on Lot 21, doing so would be “challenging and very expensive A great majority of the homes in this area will not require the work and/or expense this lot creates.”³⁹

32. Morley came to the same conclusions in the 2016 Morley Appraisals, saying that Lot 22 has “no buildable pad area” and “no apparent potential of supporting residential construction,” and that Lot 21 has “a very small construction pad area that would require significant site preparation where development of the site for a house may be cost prohibitive.”⁴⁰

33. Due to the fact that building homes on either of the Properties would be either impossible or excessively expensive, the Receiver believes that capturing any value for the Property is in the best interest of the Receivership Estate.⁴¹

34. The proposed sale will result in cash based on the fair market value of the

³⁶ *Id.* at ¶ 27.

³⁷ *Id.* at ¶ 28.

³⁸ Amended Receiver Declaration, Exh. E (Topographic Survey).

³⁹ *Id.*

⁴⁰ Amended Receiver Declaration, Ex. F (2016 Morley Appraisals).

⁴¹ Amended Receiver Declaration ¶ 29.

Properties. The purchase price for the Properties is 66.9% of the Re-appraised Value.⁴²

35. The sale of the Properties at this time will also reduce the burden to the Receivership Estate by reducing time spent by the Receiver in managing and marketing the Properties and, more importantly, will maximize the value of the Properties by ending tax and maintenance obligations associated with them.⁴³

36. The sale to the Buyer proposed herein is subject to higher and better offers, after publication notice as provided for below.⁴⁴

Publication Notice

37. Contemporaneously herewith the Receiver is filing his *Ex Parte Motion Seeking Approval of Proposed Method and Form of Publication Notice for Sale of Real Property and Memorandum in Support (Almond Heights Lots 21 & 22)* (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).⁴⁵

38. 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 *St. George Spectrum*, a newspaper published in Washington County, Utah and distributed to Toquerville, Utah, using the method and form of notice approved by the Court.⁴⁶

39. In the event that the Receiver receives and accepts a higher and better offer, he

⁴² *Id.* at ¶ 30.

⁴³ *Id.* at ¶ 31.

⁴⁴ *Id.* at ¶ 32.

⁴⁵ *Id.* at ¶ 33.

⁴⁶ *Id.* at ¶ 34.

proposes that this Amended Motion and any Order authorizing these proposed sales be deemed to apply to the higher and better offeror without further notice or hearing inasmuch as the sales 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.⁴⁷

III. ARGUMENT

40. Based on the facts above, the Receiver respectfully requests authorization to sell the Properties 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 and held by the Receiver pending resolution of any disputes related thereto. The sale of the Properties 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 Properties.⁴⁸

Sale of the Properties as Proposed is Beneficial to the Receivership Estate

41. 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."⁴⁹ Sale of the Properties as proposed herein is in the best interests of the Receivership Estate for several reasons, including at least the

⁴⁷ *Id.* at ¶ 35.

⁴⁸ Receivership Order ¶ 38.

⁴⁹ *Id.*

following.

42. *First*, the sale will result in cash for the Receivership Estate based on the fair market value of the Properties. Based on the 2016 Morley Appraisal, the Properties will be sold for 67.9% of their Re-appraised Value. The 2016 Morley Appraisals have taken into consideration current market conditions, sales of comparable properties, and the particular nature of the Properties.

43. *Second*, the sale of the Properties at this time as proposed will reduce, albeit slightly, the burden on the Receivership Estate and maximize the value of the Properties. The Receiver will no longer have to spend time managing or marketing the Properties, and the Receivership Estate will no longer have obligations related to paying taxes on and other maintenance and upkeep expenses related to the Properties.⁵⁰ Accordingly, the Receiver requests that the Court approve this sale under the terms outlined herein.

Request to Sell Almond Heights Lots 19 & 20 Free and Clear of Interests

44. As discussed above, the Receiver proposes to sell the Properties free and clear of any interests, with any such interests 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.

45. The Receiver will serve a copy of the Amended Motion on the relevant taxing authority.⁵¹

Compliance With 28 U.S.C § 2001

46. The Receivership Order provides that the Court may require that the proposed sale of real property satisfy 28 U.S.C. § 2001.⁵² Subsection (b) of § 2001 permits, with Court

⁵⁰ *Id.* at ¶ 23.

⁵¹ *Id.* at ¶ 20.

⁵² Receivership Order ¶ 39.

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.”⁵³ Here, the Receiver has complied with each of these factors.

47. Specifically, factor (1) is met in this case inasmuch as the individual purchase price for the Properties is 66.9% of the Re-appraised Value, and therefore exceeds the 2/3 requirement. Although the purchase price does not exceed 2/3 of the *average* of all four appraisals done on the Properties in the last two years, 28 U.S.C. 2001(b) does not specify that the property be sold for 2/3 of the average of all appraisals. Rather, the statute states that property must be sold for 2/3 of the “appraised value.” Because the 2016 Morley Appraisal takes into account the conclusions of the Topographic Survey that building on the Properties would be either impossible or cost-prohibitive (something which the 2014 Appraisals did not do), the Receiver maintains that the 2016 Morley Appraisal’s Re-appraised Value represents the true “appraised value” of the Properties. Accordingly, the Receiver argues that selling the Properties for 66.9% of the Re-appraised Value satisfies this factor.

48. Factor (2) is met because the Receiver has obtained a total of four appraisals from three different court appointed appraisers over the past two years in his efforts to sell the Properties and has provided the Court with the relevant portions of the appraisals.

⁵³ 28 U.S.C. § 2001(b).

49. 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.

50. 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.⁵⁴ 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

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit A**, thus authorizing the sale of the Properties free and clear of interests pursuant to the Purchase Agreements or to a higher and better offeror free and clear of purported interests.

DATED this 21st day of December, 2016.

DORSEY & WHITNEY, LLP

/s/ Peggy Hunt

Peggy Hunt
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⁵⁴ Amended Receiver Declaration ¶ 32.

