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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

SECURITIES AND EXCHANGE COMMISSION,	RECEIVER'S MOTION SEEKING APPROVAL OF AGREEMENT TO CONDUCT DUE DILIGENCE OR REMEDIAION INVESTIGATION OF EXPRESSWAY LAND AND MEMORANDUM IN SUPPORT
Plaintiff,	
v.	
NATIONAL NOTE OF UTAH, LC, a Utah Limited Liability Company and WAYNE LaMAR PALMER, an individual,	2:12-cv-00591 BSJ
Defendants.	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 1, approving the below-described *Agreement Governing Further Due Diligence Investigation by Pure Enviro Relating to Possible Purchase of Expressway Land* 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”).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
- “[T]ake 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).

- “[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[.]”⁵
- “[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[.]”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
- “Subject to [such procedures as may be required by this Court and 28 U.S.C. §§ 2001 and 2004] the Receiver is authorized to . . . cause the sale or lease of all real property in the Receivership Estate, 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 property value of such real property.”⁸

II.

THE EXPRESSWAY LAND

Land Description

3. The Receivership Estate includes land located at approximately 1130 North 1270 East in Spanish Fork, Utah (“Expressway Land”). The Expressway Land consists of 30.85 acres of land, divided into four parcels:

<u>Parcel No.</u>	<u>Size</u>	<u>Tax Serial Number</u>	<u>Appraised Value</u>
• Parcel 1	21.25 acres	27:010:0067	650,000.00
• Parcel 2	3.94 acres	27:010:0068	290,000.00

⁵ *Id.* at ¶ 7(C).

⁶ *Id.* at ¶ 7(D).

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 38. *See also* ¶ 39 (procedures to be followed for the sale of real property).

- Parcel 3 2.30 acres 27:010:0064 50,000.00
- Parcel 4 3.36 acres 38:400:0307-0326 325,000.00⁹

4. The Expressway Land is primarily undeveloped land, but is more particularly described as follows:

(a) Parcel 1 is all undeveloped land.

(b) Parcel 2 was preliminarily platted for 20 industrial condominium units and one building, and currently has some site improvements. The planned development on Parcel 2 has not been approved or recorded.

(c) Parcel 3 is all undeveloped land that has no right of way access apart from the other parcels.

(d) Parcel 4 includes 20 improved and recorded industrial condominium pads. Approval of the improvements has expired and would have to be brought to current building code requirements if the original development plan were pursued.¹⁰

5. Based on the Receiver's investigation he has learned that most of the Expressway Land was operated for several decades as an unregulated landfill for Utah County and Spanish Fork City.¹¹

6. Spanish Fork City recently informed the Receiver it will require that waste buried at the site be removed down to the native soil for areas that will be used for roads, utilities, and

⁹ Receiver Declaration ¶ 4.

¹⁰ Receiver Declaration ¶ 5.

¹¹ Receiver Declaration ¶ 6.

buildings. In addition, prior improvements made to the Expressway Land as noted above may need to be reconstructed to conform to current requirements.¹²

7. Approximately one third of the Expressway Land has been preliminarily designated by the U.S. Army Corps of Engineers as wetlands, substantially impairing its potential for development for commercial use.¹³

Prior Marketing Efforts by the Receiver

8. On August 23, 2012, the Receiver signed a listing agreement for the Expressway Land with a commercial real estate broker. The listing agreement included a listing price of \$3.5 million, a price recommended by the listing broker based on a market analysis of surrounding property, but without consideration of the full extent of environmental risks relating to the property—which were not known at the time.¹⁴

9. In February 2014, the listing broker informed the Receiver that the broker had received some expressions of interest in the Expressway Land, but the potential buyers had significant concerns about the Expressway Land having previously been a landfill. These buyers indicated that their bids were likely to be \$2 million or less, depending on their due diligence.¹⁵

10. The Receiver expressed his intent to make the buyers' bids subject to higher and better offers, and the buyers informed him that they reluctant to expend the time and money to

¹² Receiver Declaration ¶ 7.

¹³ Receiver Declaration ¶ 8.

¹⁴ Receiver Declaration ¶ 9.

¹⁵ Receiver Declaration ¶ 10.

conduct due diligence in the absence of a firm commitment from the Receiver that they would be the ultimate buyers at the end of the due diligence period.¹⁶

11. Hoping to satisfy the buyers' concerns, the Receiver obtained an appraisal of the Expressway Land to determine the value of the property in light of the then-known environmental risks. On March 19, 2014, the Receiver obtained an appraisal of the Expressway Land ("Appraisal") from Merit Valuation LLC, excerpts of which are attached to the Receiver Declaration as Exhibit A. Merit Valuation LLC was selected by the Receiver based on its experience in evaluating environmental hazards and wetlands limitations in valuing properties.¹⁷

12. Merit Valuation LLC valued the Expressway Land at \$1,315,000.00 if the four parcels were sold individually, or \$1,250,000.00 if sold in a bulk sale. The Appraisal revealed that (a) environmental problems were more significant than previously known, (b) a significant portion of the land was subject to a preliminary wetlands determination by the Army Corps of Engineers, and (c) remediation costs required by Spanish Fork City prior to its issuing construction permits would be significant.¹⁸

13. In April 2014, the Receiver began negotiating with a potential purchaser of the Expressway Land. A preliminary purchase agreement was signed on June 27, 2014, pursuant to which the buyer would pay \$1,250,000.00 for the Expressway Land, subject to the results of a

¹⁶ Receiver Declaration ¶ 11.

¹⁷ Receiver Declaration ¶ 12.

¹⁸ Receiver Declaration at Exh. A.

60-day due diligence review period. On August 26, 2014, the buyer canceled the purchase agreement citing the results of its due diligence investigation.¹⁹

14. On October 10, 2014, the Receiver received an offer of \$1 million for the Expressway Land. This offer was subject to a 90-day due diligence period. The Receiver decided the offered price was too low and did not sign a preliminary purchase agreement.²⁰

15. On October 22, 2014, the Receiver began negotiating a possible purchase of the Expressway Land by Pure Enviro Properties LC ("Pure Enviro"). A preliminary purchase agreement was signed on November 13, 2014. Under the agreement, Pure Enviro was given a 90-day period to conduct due diligence.²¹

16. The Receiver understands that Pure Enviro engaged an engineering firm to conduct a wetlands analysis and an analysis of the location and extent of buried waste on the property. As a result of these analyses, Pure Enviro notified the Receiver on December 18, 2014 that it would not proceed with the purchase of the Expressway Land.²²

Proposed Agreement for Due Diligence and Possible Purchase of Expressway Land

17. In discussions the Receiver had with Pure Enviro relating to the reasons it was withdrawing its offer for the Expressway Land, Pure Enviro explained that while the possibility exists that the Expressway Land could be developed in a commercially viable manner, the possibility of creating value in the land depended on a variety of factors that would require

¹⁹ Receiver Declaration ¶ 13.

²⁰ Receiver Declaration ¶ 14.

²¹ Receiver Declaration ¶ 15.

²² Receiver Declaration ¶ 16.

extensive and expensive testing and remediation work. Due to the risk that environmental problems could not be remediated at an affordable price, Pure Enviro was unwilling to purchase the Expressway Property without knowing the extent of potential environmental damage on the property—regardless of the purchase price.²³

18. Since December 2014, the Receiver has engaged in discussions with Pure Enviro regarding the terms under which Pure Enviro would: (a) conduct the testing and measurements necessary to obtain a formal wetlands delineation for that portion of the Expressway Land subject to a preliminary wetlands determination, (b) identify other properties that potentially could be purchased for a wetlands swap and determine the costs for such property, (c) investigate the geographic coverage of the former landfill and the depth of buried waste, (d) conduct the testing necessary to determine the extent to which the landfill waste contains contaminants that need to be removed, contained, or otherwise remediated, (e) determine the extent to which land on which waste is located can be approved for commercial development, (f) evaluate the costs of replacing or moving certain existing utility and sewer lines and the necessity of and cost for replacing other existing improvements on the property, and (g) determine what demand might exist for those portions of the Expressway Land that might be available for development.²⁴

19. The Receiver also understands that these testing, investigation, and remediation evaluations will take substantial time and the Receiver anticipates that Pure Enviro will incur significant expense. However, two factors make Pure Enviro unwilling to incur these costs under conditions imposed by the Receiver. First, the Receiver indicated his unwillingness to

²³ Receiver Declaration ¶ 17.

²⁴ Receiver Declaration ¶ 18.

expend Receivership resources to conduct additional environmental testing or obtain formal wetlands delineation. If this additional testing and wetlands determination were not performed before the property purchase, Pure Enviro would be at risk of purchasing a property that was later determined to be of no commercial value or to have severe contamination problems that would result in Pure Enviro being held liable for cleanup costs beyond any amounts it paid for the property. Second, since the Receiver indicated he would require that any offer to purchase the property be subject to public notice and an auction at which other bidders could bid for the property, if Pure Enviro performed and paid for the investigation work before making an offer, Pure Enviro would face the risk of having expended significant amounts of time and money to determine whether the property had value, only to have other buyers purchase the property with no compensation to Pure Enviro for the expenses it has incurred.²⁵

20. To address these concerns, the Receiver has negotiated an agreement with Pure Enviro governing further due diligence investigation ("Agreement"), a copy of which is attached as Exhibit B to the Receiver Declaration, in hopes of creating an incentive for Pure Enviro to expend time and its own funds to investigate the extent of wetlands limitation and environmental contamination before having title to the Expressway Land.²⁶

21. While the Agreement should be reviewed for an understanding of the details of the terms of the parties' agreement, the principal terms of the Agreement are as follows:

- a. The Agreement is conditioned on approval by this Court;

²⁵ Receiver Declaration ¶ 19.

²⁶ Receiver Declaration ¶ 20.

b. The Agreement is for a term of three years, commencing on the date that the Court enters its order approving the Agreement.

c. Pure Enviro will conduct additional due diligence on the Expressway Land that it reasonably believes is appropriate, including environmental assessments, wetlands testing, drilling core samples, and engineering analysis. Pure Enviro will bear all the costs of this due diligence work. If the Expressway Land is not sold during the three-year term of this Agreement, the Receivership Estate will have no obligation to reimburse any of the costs incurred by Pure Enviro in its investigation.

d. Pure Enviro will give periodic progress reports to the Receiver on the work it is conducting, but the work product of its investigation will belong to Pure Enviro unless it seeks reimbursement for its costs.

e. If Pure Enviro makes an offer for the purchase of all or part of the Expressway Land, the property sale will be subject to higher and better offers and approval by the Court. Under this scenario, if Pure Enviro is the sole or high bidder, the proceeds of sale will be distributed as follows: (i) payment of real estate taxes owed, sales commissions, and closing costs, (ii) reimbursement to Pure Enviro of its out-of-pocket costs expended in due diligence on the Expressway Land, (iii) payment to the Receiver in an amount equal to the appraised value of the Expressway Land being purchased, and (iv) division of remaining funds between the Receiver and Pure Enviro, with the Receivership Estate being paid 25% of the excess amount and Pure Enviro receiving 75%;

f. If the Expressway Land is sold pursuant to a public sale resulting from an offer by a purchaser other than Pure Enviro, Pure Enviro will be invited to bid at the auction. In

the event Pure Enviro is not the high bidder, the Receiver will reimburse Pure Enviro, from the net sales proceeds, the out-of-pocket costs expended by Pure Enviro plus an amount equal to three times the out-of-pocket costs representing the time and lost opportunity costs expended by Pure Enviro in its investigation. However, payments to Pure Enviro will not exceed 75% of the net proceeds from the sale of the property. In the event Pure Enviro is reimbursed for its expenses, the testing results and other work product associated with its due diligence investigation will become property of the Receivership Estate.

g. If Pure Enviro offers to purchase a portion of the Expressway Land such that subdivision of the land is required, the Receiver will pay or reimburse the out-of-pocket costs of surveys and legal expenses required to subdivide the land.

h. During the time Pure Enviro is conducting due diligence on the Expressway Land, the Receiver will continue to market the Expressway Land and solicit offers from any buyers.

i. If the Receiver determines that he is unlikely to obtain offers for the Expressway Land through existing marketing efforts and seeks permission from the Court to conduct a no-reserve auction, Pure Enviro will be permitted to use its out-of-pocket due diligence expenses as a credit-bid component of any auction offer it makes.

j. If the Receiver determines that the Expressway Land likely has no value to the Receivership Estate and seeks Court permission to abandon the Receivership Estate's interest in the property, the Receiver will request Court approval to abandon the Receivership Estate's interest to Pure Enviro, in the event Pure Enviro desires to take title to the Expressway Land

subject to Pure Enviro’s obligation to pay all property taxes and government liens on the property.

k. The agreement will expire three years from the date of Court approval of the Agreement. If no portion of the Expressway Land has sold during that period, the Receiver shall have no obligation to make payments to Pure Enviro for the work it has done or the expenses it has incurred relating to the Expressway Land.

III.

APPLICABLE LAW AND ANALYSIS

22. The Receivership Order, as set forth above, anticipates the relief sought by the Receiver herein, which is within the scope of his duties under that Order.²⁷

23. Pursuant to paragraph 38 of the Receivership Order, the Receiver is taking “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” The Agreement being proposed through this Motion addresses characteristics of the property that most affect its valuation—the environmental liabilities—while preserving public sale bidding and review and approval of any sale by this Court pursuant to the terms of paragraph 39 of the Receivership Order.

24. While this Agreement does not directly involve the sale of real property, the Receiver is seeking Court approval of this Agreement because this Agreement contains terms

²⁷ See *supra* ¶¶ 1-2.

that may affect the terms of a future sale of the Expressway Land and contains some conditional obligations by the Receiver relating to the property.²⁸

25. The Agreement specifically provide that any sale of the Expressway Land will be subject to approval by the Court, which includes the Receiver's obligation to comply with 18 U.S.C. §§ 2001 and 2002 by conducting private or public sales of the property.

26. The Receiver submits that this Agreement is fair, reasonable, and adequate for at least the following reasons: (a) an independent appraiser with experience in dealing with environmental contamination has determined that the Expressway Land is the subject of extensive environmental contamination that will be expensive to remediate, (b) despite aggressive marketing of the Expressway Land for two-and-a-half years, no buyer has been willing to purchase the property, (c) two potential buyers have withdrawn their preliminary offers after conducting due diligence on Expressway Land, (d) the Agreement was fairly and honestly negotiated at arm's length and in good faith by the parties, (e) the Receiver has not identified any other viable means of investigating the environmental risks of the Expressway Land without expending substantial Receivership Estate funds—which might not be recovered, and (f) the terms of the Agreement are fair and reasonable.²⁹

27. In light of these factors, the Receiver believes the Agreement is just, fair and beneficial to the Receivership Estate. Accordingly, the Agreement should be approved.³⁰

²⁸ Receiver Declaration ¶ 21.

²⁹ Receiver Declaration ¶ 22.

³⁰ Receiver Declaration ¶ 23.

IV.

CONCLUSION

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit 1**, authorizing the Receiver to enter into the Agreement described above.

DATED this 13th day of April, 2015.

DORSEY & WHITNEY LLP

Peggy Hunt
Chris Martinez

Attorneys for Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S MOTION SEEKING APPROVAL OF AGREEMENT TO CONDUCT DUE DILIGENCE OR REMEDIATION INVESTIGATION OF EXPRESSWAY LAND AND MEMORANDUM IN SUPPORT** (the "Motion") was filed with the Court on this 13th day of April, 2015, and served via ECF on all parties who have requested notice in this case.

Furthermore, I certify that on the 13th day of April, 2015, 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

/s/ Candy Long

EXHIBIT 1

Prepared and Submitted By:

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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
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<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>ORDER GRANTING RECEIVER'S MOTION SEEKING APPROVAL OF AGREEMENT TO CONDUCT DUE DILIGENCE OR REMEDIATION INVESTIGATION OF EXPRESSWAY LAND</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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The matter before the Court is the *Motion Seeking Approval of Agreement to Conduct Due Diligence or Remediation Investigation of Expressway Land* (the "Motion") filed by 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. The Court has reviewed the Motion, the Receiver's Declaration, including the Agreement attached thereto as Exhibit B, and applicable law, and for good cause shown

IT IS HEREBY ORDERED that:

- (1) The Motion is **GRANTED**; and
- (2) The Agreement attached to the Receiver's Declaration as Exhibit B is **APPROVED**.

DATED this ___ day of April, 2015.

BY THE COURT

The Honorable Bruce S. Jenkins
United States District Court