

Peggy Hunt (Utah State Bar No. 6060)
Chris Martinez (Utah State Bar No. 11152)
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

Attorneys for Court-Appointed Receiver R. Wayne Klein

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

<p>R. WAYNE KLEIN, as Receiver of National Note of Utah, LC <i>et al.</i>,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>LARRY L. ADAMS, <i>et al.</i>,</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: center;">MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT</p> <p style="text-align: center;">(KIMBERLY J. BRASHER)</p> <p style="text-align: center;">Civil No. 2:14-cv-00614</p> <p style="text-align: center;">The Honorable Bruce S. Jenkins</p>
---	--

Pursuant to Federal Rule of Civil Procedure 56, and DUCiv R 56-1, Plaintiff, R. Wayne Klein (the “Receiver”), the duly appointed Receiver in the case styled as *Securities and Exchange Commission v. National Note of Utah, LC et al.*, Case No. 2:12-cv-00591 (D. Utah) (the “Civil Enforcement Action”), by and through his counsel of record, hereby files this *Motion for Summary Judgment and Memorandum in Support (Kimberly J. Brasher)* (the “Motion”) against Defendant Kimberly J. Brasher (the “Defendant”).

This Motion is supported by the *Declaration of Receiver R. Wayne Klein, Receiver* (the “Klein Declaration”), a true and correct copy of which is attached hereto as **Exhibit A**, as well as the Memorandum in Support set forth below. A proposed Order is attached hereto as **Exhibit B**.

MEMORANDUM OF LAW

I.

INTRODUCTION

National Note of Utah, L.C. (“National Note”) solicited millions of dollars from investors through the issuance of promissory notes. Some investors were provided with an “*Assignment of Beneficial Interest in Trust Deed*” or “ABI” which purportedly afforded these select investors with security for amounts allegedly owed to them under their notes. Defendant Kimberly J. Brasher is one of these select investors. Yet, all of the ABIs, including Defendant’s ABIs, were a sham -- they have no legal effect and are invalid as a matter of law. In recognition of the invalidity of the ABIs, more than 290 ABIs have been voluntarily released by ABI holders.¹ Defendant has not released her ABIs, and thus she has been included as a defendant in the above-captioned proceeding, seeking a declaratory judgment that her ABIs (along with others) are invalid and void as a matter of law. The Receiver thus requests that the Court enter judgment on his First Claim for Relief, declaring that the Defendant’s ABIs are invalid and void as a matter of law.

II.

PROCEDURAL HISTORY

1. On June 25, 2012, the Securities & Exchange Commission commenced the Civil Enforcement Case in this Court by filing a *Complaint* against National Note, alleging that Wayne LaMar Palmer operated National Note and its many affiliated entities as a Ponzi scheme and

¹ Klein Declaration ¶ 4. At this time, at least 25 default judgments also have been entered against defendants in the above-captioned proceeding who have not answered the Complaint filed and served on them. *Id.*

asserting causes of action for securities fraud.²

2. On June 25, 2012, the Court entered an *Order Appointing Receiver and Staying Litigation* (the “Receivership Order”) in the Civil Enforcement Case, appointing the Receiver and creating the Receivership Estate, which includes National Note and its subsidiaries and affiliates and their respective assets.³

3. On September 12, 2013, the Receiver filed his *Complaint* against the Defendant and others, seeking to obtain a judgment declaring the Defendant’s ABI to be invalid and void (First Claim for Relief).⁴

4. The Defendant has been served in this action and has filed an Answer.

5. This Motion asks the Court to enter a judgment declaring the Defendant’s ABIs to be invalid and void.

III.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. Legal Elements and Authorities:

An assignment of a deed of trust without assignment of the underlying debt instrument is void as a matter of law.⁵

² Civil Enforcement Case, Docket No. 1.

³ Civil Enforcement Case, Docket No. 9 (Receivership Order), a copy of which is attached as Exhibit 1 to the Klein Declaration.

⁴ Complaint, Docket No. 2.

⁵ See *infra* Part IV(B) (discussing Utah Code Ann. § 70A-9a-109, Official Comment 7; *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009); *Wolfe v. Leisure Time Sports, Inc. (In re Leisure Time Sports, Inc.)*, 194 B.R. 859, 861 (9th Cir. BAP 1996); *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 970-71 (Bankr. N.D. Ill. 1991); *Pierce v. Tavormina (In re Hurricane Resort Co.)*, 30 B.R. 258, 260-61 (S.D. Fla. 1983)).

B. Material Facts Necessary to Meet the Elements:

Relevant Expressway Business Park, LLC – National Note Transactions

1. Expressway Business Park, LLC (“Expressway”) is one of the numerous National Note affiliates subject to the Receivership Order.⁶

2. Pursuant to a *Balloon Note* dated March 31, 2005, National Note purported to lend funds to Expressway (the “Expressway Note”).⁷

3. Expressway executed a *Deed of Trust* dated March 31, 2005 in conjunction with the Expressway Note (the “Expressway Deed of Trust”), purporting to give National Note a secured interest in certain real property located in Spanish Fork, Utah (the “Expressway Property”).⁸ The Expressway Deed of Trust in favor of National Note was recorded in Utah County, Utah at Entry No. 34529:2005.⁹

The Defendant’s First ABI

4. National Note solicited investors by issuing promissory notes to them, promising to repay monies that had been “lent” to National Note plus interest.¹⁰

5. In 2010, the Defendant transferred \$85,000 to National Note, and a *Promissory Note* dated April 21, 2010, was issued (the “First Brasher Note”).¹¹

6. National Note executed an “*Assignment of Beneficial Interest in Trust Deed for*

⁶ Klein Declaration ¶ 5 & Exhibit 1 (Receivership Order, at 1-3).

⁷ *Id.* ¶ 6 & Exhibit 2 (Expressway Note).

⁸ *Id.* ¶ 7 & Exhibit 3 (Expressway Deed of Trust).

⁹ *Id.*, Exhibit 3 (Expressway Deed of Trust).

¹⁰ *Id.* ¶ 8.

¹¹ *Id.* ¶ 9 & Exhibit 4 (First Brasher Note).

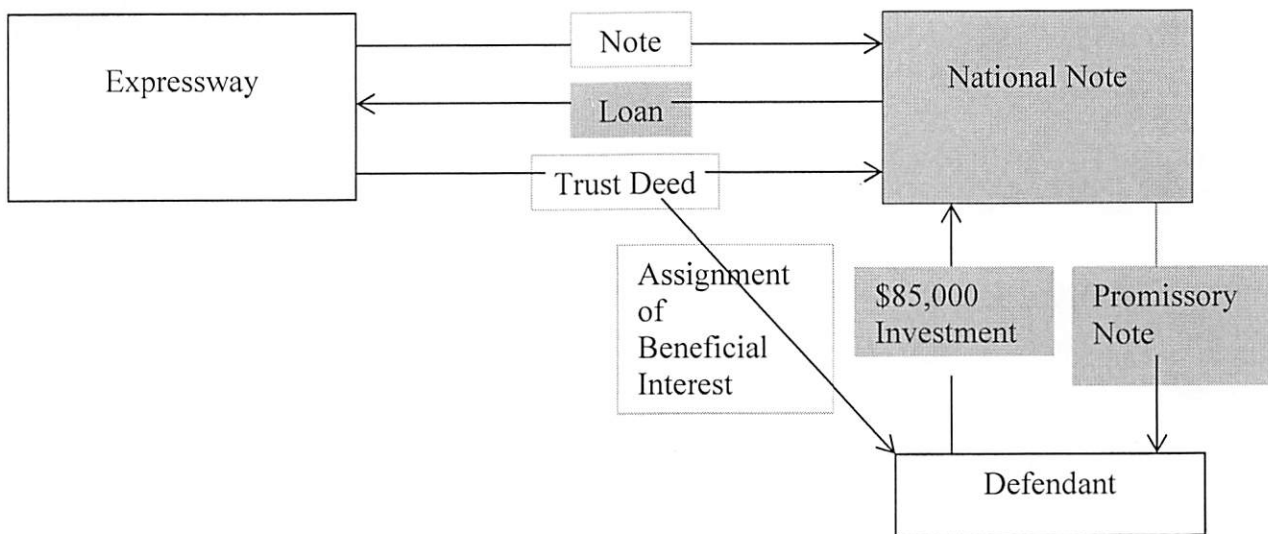
Security” dated April 22, 2010, in favor of the Defendant (the “First Brasher ABI”), granting Defendant nothing more than in interest in National Note’s interest in the Expressway Deed of Trust, stating in part as follows:

For value received, and to secure the payment of [the First Brasher Note], the undersigned Assignor, National Note of Utah, L.C., hereby assigns to the Assignee(s), Kimberly J. Brasher, an undivided \$85,000.00 of Assignor’s right, title and interest in and to the beneficial interest in that certain Trust Deed dated March 31, 2005, between Expressway Business Park, LLC, a Utah limited liability company as Trustor(s), in favor of Pro-Title and Escrow, Inc., as Trustee, for the benefit of National Note of Utah, LC, as Beneficiary. . . .¹²

7. National Note did not execute any assignment of its interest in the Expressway Note to the Defendant.¹³

8. Expressway is not a party to the First Brasher ABI.¹⁴

9. The following graph illustrates the transaction:



10. The First Brasher ABI was filed in Utah County, Utah at Entry No. 32691:2010.¹⁵

¹² *Id.* ¶ 10 & Exhibit 5 (First Brasher ABI).

¹³ *Id.* ¶ 13.

¹⁴ *Id.*, Exhibit 5 (First Brasher ABI).

The Defendant's Second ABI

11. In 2010, the Defendant transferred an additional \$15,000 to National Note, and a *Promissory Note* dated May 11, 2010, was issued (the "Second Brasher Note").¹⁶

12. National Note executed an "*Assignment of Beneficial Interest in Trust Deed for Security*" dated May 12, 2010, in favor of the Defendant (the "Second Brasher ABI"), granting Defendant nothing more than an interest in National Note's interest in the Expressway Deed of Trust, stating in part as follows:

For value received, and to secure the payment of [the Second Brasher Note], the undersigned Assignor, National Note of Utah, L.C., hereby assigns to the Assignee(s), Kimberly J. Brasher, an undivided \$15,000.00 of Assignor's right, title and interest in and to the beneficial interest in that certain Trust Deed dated March 31, 2005, between Expressway Business Park, LLC, a Utah limited liability company as Trustor(s), in favor of Pro-Title and Escrow, Inc., as Trustee, for the benefit of National Note of Utah, LC, as Beneficiary. . . .¹⁷

13. National Note did not execute any assignment of its interest in the Expressway Note to the Defendant.¹⁸

14. Expressway is not a party to the Second Brasher ABI.¹⁹

15. The following graph illustrates the transaction:

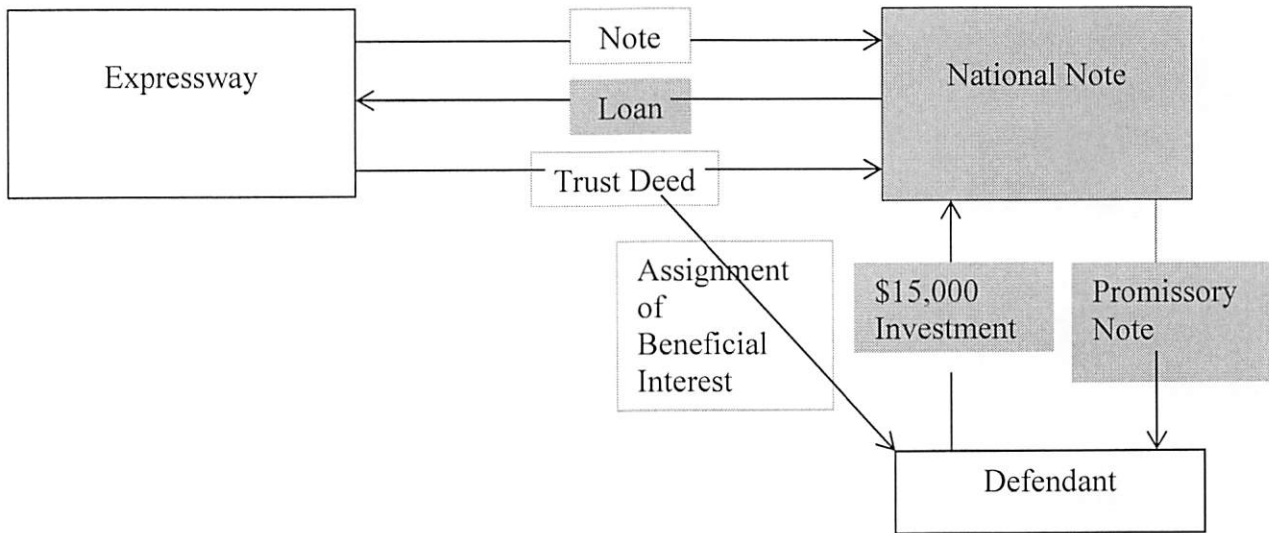
¹⁵ *Id.*, Exhibit 5 (First Brasher ABI).

¹⁶ *Id.* ¶ 11 & Exhibit 6 (Second Brasher Note).

¹⁷ *Id.* ¶ 12 & Exhibit 7 (Second Brasher ABI).

¹⁸ *Id.* ¶ 13.

¹⁹ *Id.*, Exhibit 7 (Second Brasher ABI).



16. The Second Brasher ABI was filed in Utah County, Utah at Entry No. 39226:2010.²⁰

IV.

ARGUMENT

A. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court “shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In this matter, the material facts are undisputed or cannot be disputed, presenting pure issues of law for determination by the Court. Accordingly, for the reasons discussed below, the Court should grant summary judgment and declare that the Brasher ABIs are invalid as a matter of law.

B. The Brasher ABIs are Void as a Matter of Law

²⁰ *Id.*, Exhibit 7 (Second Brasher ABI).

Courts uniformly hold that any attempt to transfer a security interest without transfer of the underlying debt is void. This rule is typically explained as follows: “A security interest cannot exist, much less be transferred, independent from the obligations which it secures. The security interest follows the debt. If the debt is not transferred, neither is the security interest.”²¹ Thus, “[a]n assignment of the deed of trust separate from the note has no ‘force’”²²— if the note is not also assigned, the assignment of the deed of trust is, for all practical purposes, ineffectual because the note and deed of trust have become split.²³

Utah law follows this rule. Utah Code Ann. § 70A-9a-109 discusses the scope of Utah’s Uniform Commercial Code, particularly as it relates to the assignment of a mortgage or other security interest in real and personal property. Official Comment 7 to that section states: “An attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective.” The comment further states that: “Finally . . . one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation.”²⁴

Here, it is undisputed and cannot be disputed that National Note has not assigned any interest that it has in the Expressway Note to the Defendant. Rather, by the express terms of the

²¹ *Wolfe*, 194 B.R. at 861. *Accord, e.g., Yorke*, 125 B.R. at 970-71 (citation omitted) (“It is hornbook law that a mortgage follows the debt it secures. An assignment of a mortgage without the transfer of the underlying note is a nullity.” & “It is axiomatic that any attempt to assign the mortgage without transfer of the debt will not pass the mortgagee’s interest to the assignee.”).

²² *Bellistri*, 284 S.W.3d at 623.

²³ *Id.* at 624.

²⁴ Utah Code Ann. § 70A-9a-109, Official Comment 7.

First and Second Brasher ABIs, National Note only assigned to the Defendant its beneficial interest in the Expressway Deed of Trust. Accordingly, under the law set forth above, the Brasher ABIs “ha[ve] no force” as a matter of law²⁵ and the Receiver is entitled to summary judgment on his First Cause of Action declaring the Brasher ABIs to be invalid.

V.

CONCLUSION

For all of the reasons set forth above, the Brasher ABIs are void as a matter of law. Accordingly, the Receiver respectfully requests that this Court grant the Receiver’s Motion and enter summary judgment against Defendant on his First Cause of Action.

DATED this 1st day of May, 2015.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Attorneys for Receiver

²⁵ *Bellistri*, 284 S.W.3d at 623.

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** was served via the Court's ECF system on all parties who have requested notice in this case.

Kimberly J. Brasher
3893 E. Memorial Rd.
Edmond, OK 73013

/s/ Candy Long