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IN THE 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.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Civil No.: 2:12-cv-00591-BSJ

Judge: Bruce S. Jenkins

Plaintiff Securities and Exchange Commission (the "Commission") sued Defendants National Note of Utah, LC ("National Note") and Wayne LaMar Palmer ("Palmer") for violations of the federal securities laws, including Sections 17(a)(1), (2), and (3) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)], Section 10(b) of the Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b) and Rule 10b-5 thereunder [17 C.F.R. 240.10b-5],

Sections 5(a) and (c) of the Securities Act [15 U.S.C. § 77e(a), (c), and Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a).

The case was tried to the Court on November 2, 2015. Plaintiff was represented by Amy J. Oliver and Daniel J. Wadley. Defendants National Note and Palmer elected not to participate in the trial and no counsel represented either Defendant at trial. The Court heard the testimony of witnesses, received into evidence multiple exhibits, and considered the Plaintiff's oral arguments. Based on the evidence presented, the Court enters the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

The Court enters these findings of fact based on a preponderance of the evidence. In assessing the credibility of the witnesses, the Court has considered the source and basis of each witness's knowledge; the ability of each witness to observe; the strength of each witness's memory; each witness's interest, if any, in the outcome of the litigation; and the extent to which each witness's testimony is either supported or contradicted by other evidence presented at trial.

1. National Note was a Utah Limited Liability Company organized on December 30, 1992. National Note's principal place of business was in West Jordan, Utah. It was owned and controlled by Palmer.
2. National Note was initially in the business of making hard money loans.
3. Beginning in the late 1990's, National Note began investing in real estate properties.
4. Palmer was the sole owner and managing member of National Note. Palmer resides in West Jordan, Utah.
5. Palmer has never held a securities license nor been registered with the Commission in

any capacity. Palmer has never been associated with a registered broker or dealer.

6. Palmer made all business decisions for National Note, including all decisions regarding the use of investor funds.

7. Palmer was a signatory on all of the bank accounts of National Note and authorized all transfers.

8. Palmer formed and controlled approximately 40 related entities in addition to National Note.

9. Since approximately 2006, National Note transacted business almost exclusively with the related entities.

10. Palmer solicited investors to purchase National Note promissory notes which paid interest at a fixed annual rate of 12%. The notes carried a term of between two and five years that could be renewed for additional terms.

11. Investors chose whether to receive their interest payments monthly, quarterly, or at maturity. They also chose whether to receive interest payments in cash or have them added to principal.

12. Palmer located new investors primarily by word of mouth and referrals. In addition, he taught real estate seminars across the country, and also made contact with potential investors at these speaking engagements.

13. Palmer told investors that National Note would use their funds to buy and sell mortgage notes, underwrite and make loans, or buy and sell real estate assets.

14. Palmer assured investors that National Note was able to pay the promised returns of 12% annually because National Note successfully invested the funds in projects and assets

earning annual returns of 18%.

15. Palmer represented to investors that both their 12% return and the safety of their principal were guaranteed and risk free.

16. The notes that Palmer and National Note offered are securities.

17. No registration statement was filed as to any offering of notes by National Note.

18. Palmer signed each investor promissory note on behalf of National Note.

19. In total, National Note raised approximately $140 million from more than 600 investors.

20. In September 2007, National Note filed a Form D with the Commission claiming an exemption from registration under Rule 506 of Regulation D under the Securities Act of 1933.

21. National Note promissory notes were offered and sold through a Private Placement Memorandum which included financial statements for the year ended December 31, 2006 and, subsequently, 2007. These financial statements were not audited.

22. Palmer mailed the PPM and a subscription agreement to potential investors through the mail.

23. Through at least February 2008, Palmer provided prospective investors with a glossy marketing brochure touting the National Note program. He also made this brochure available to attendees at the real estate seminars he conducted, on a table near the door.

24. According to the brochure, "National Note pays the interest payments to its clients even when the property owner fails to pay on the loan."

25. Both the brochure and PPM were prepared at Palmer's direction and under his supervision. The PPM was prepared by a law firm hired by Palmer.

26. In its PPM and its marketing materials, National Note claimed to use investors' funds for hard money loans, the purchase of notes, and the acquisition of real estate. Palmer told investors he deployed their funds in projects that would earn sufficient returns to pay the promised 12% annual return.

27. National Note investors initially deposited their funds into an account at JP Morgan Chase Bank titled "investor trust account." National Note then wired nearly all these investor funds to an account at Wells Fargo titled "investor interest account." National Note's internal accounting classified the investor funds as income upon transfer to the Wells Fargo investor interest account.

28. From the Wells Fargo investor interest account, the funds were used to pay returns to other investors.

29. In October 2011, National Note stopped making investor interest payments according to their terms to most investors. While some investors received sporadic payments, none received the full amount due them.

30. By November 2011, National Note had largely ceased making payments altogether.

31. The Commission presented testimony from Richard Hoffman, Jr., a forensic accountant specializing in insolvency analysis and business valuation. After hearing Mr. Hoffman's education and experience, the Court concluded that Mr. Hoffman was qualified as an expert on insolvency and business valuation.

32. Mr. Hoffman offered the following opinions:

    a. National Note was insolvent beginning in at least 2009.

i. National Note was insolvent using the Balance Sheet Test, which considered the fair value of National Note's assets compared with its liabilities.

1. As of December 31, 2009, National Note's liabilities exceeded the fair value of its assets by approximately $24 million.
2. In 2010 and 2011, National Note's liabilities grew each year and exceeded the fair value of its assets by $39 million and $48 million, respectively.
3. As of June 30, 2012, National Note's liabilities exceeded the fair value of its assets by approximately $68 million.

ii. National Note was insolvent as determined by National Note's inability to pay its debts as they became due.

1. In 2009, and in each subsequent year, the funds available to National Note from its operations were always negative.
2. The funds available to National Note from its operations were insufficient to fund its annual operating expenses.
3. In order to continue operating, National Note used the cash inflow from its investors to fund its negative operating cash flow and its interest obligations to investors.

iii. National Note did not have the ability to pay investors without bringing in new investor funds.

33. The Court finds Mr. Hoffman's opinions persuasive for the following reasons:

a. Mr. Hoffman is well-qualified by both his education and experience to offer opinions on the insolvency of National Note.

b. Mr. Hoffman conducted multiple analyses of National Note's financial status using National Note's own accounting records and crediting National Note with the highest possible values for its assets.

34. R. Wayne Klein, an attorney and the court-appointed Receiver in this case, testified that, contrary to Mr. Palmer's representations to investors, their investments were not secured by real estate and the real estate holdings that National Note did have were not worth anywhere near the amount that was owed on the properties.

35. Mr. Klein testified that National Note lacked positive net income from operations to pay distributions to investors and it also lacked equity capital in the company to draw from to pay distributions to investors.

36. Mr. Klein further testified that at least as early as 2009, National Note's only option to fund payments to prior investors was to use money from new investors.

37. Mr. Klein testified that from at least 2009, National Note operated as a Ponzi scheme.

38. Palmer was the individual who spoke to potential investors about National Note.

39. Palmer did not inform investors that National Note was insolvent.

40. Palmer did not inform investors that National Note would use new investor funds to pay old investors.

41. Palmer, knowing about National Note's insolvency, continued to solicit new investors, while not disclosing that National Note was delinquent in making investor payments.

42. Palmer failed to inform investors that National Note transacted business almost

exclusively with related entities since approximately 2010.

43. Palmer knew that either he or National Note, at his direction, was misrepresenting National Note's business and use of investor funds.

44. Palmer knew that he or National Note, at his direction, was misrepresenting to investors that those investors had a lien and could foreclose on an asset in order to recover their investment.

45. Palmer knew that he was selling unregistered securities without properly qualifying for an exception to the registration requirements.

46. Investors testified that if Palmer had disclosed this information to them, they would not have invested in National Note.

47. James Shupe, who holds a Master's Degree in Accounting and a C.P.A. license, testified that as part of his work as an accountant for the Receiver, he calculated the actual money flow of funds from investors to National Note based upon National Note's records and bank statements.

48. Mr. Shupe testified that the total amount of funds invested in National Note was $140,445,842.44 and the total amount of funds paid to investors was $88,509,524.72.

49. Mr. Shupe calculated the amount that National Note owed to investors as of June 25, 2012, was $51,936,317.72.

## CONCLUSIONS OF LAW

1. The Court has subject-matter jurisdiction over this case under 15 U.S.C. section(s) 77t, 77v, 78u, and 78aa.

2. Venue is proper in the United States District Court for the District of Utah pursuant to 15 U.S.C. section(s) 77v(a) and 78aa.

3. In order to prove Palmer violated Sections 17(a) of the Securities Act and 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must establish by a preponderance of the evidence that (1) in connection with the purchase, offer, and/or sale of securities; (2) Palmer engaged in a scheme to defraud when he made untrue statements, omitted material facts, and engaged in transactions, practices or courses of business that operated as a fraud or deceit upon the investor; (3) Palmer's misrepresentations or omissions were material, such that a reasonable investor would consider the misrepresented or omitted facts to be important in making an investment decision; and (4) Palmer acted with the requisite scienter in that he intended to deceive, manipulate or defraud investors, or acted recklessly in doing so. Aaron v. SEC, 446 U.S. 680, 701 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Basic Inc. v. Levinson, 485 U.S. 224, 231-232 (1988); SEC v. Wolfson, 539 F.3d 1249, 1256 (10th Cir. 2008); Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 595-97 (10th Cir. 1979) (defining scienter as reckless conduct); see also SEC v. Curshen, No. 09-1196, 2010 U.S. App. LEXIS 7555, at *11 (10th Cir. Apr. 13, 2010).

4. In order to establish a violation of Sections 5(a) and (c) of the Securities Act, the Commission must demonstrate by a preponderance of the evidence that defendant Palmer, directly or indirectly, offered or sold securities without a registration statement having been filed or in effect. See SEC v. Int'l Chem. Dev. Corp., 469 F.2d 20, 27 (10th

Cir. 1972). "The elements of [an] action for violation of Section 5 are (1) lack of a registration statement as to the subject securities; (2) the offer or sale of the securities; and (3) the use of interstate transportation or communication and the mails in connection with the offer or sale." Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 124 (2d Cir. 1998) (quoting In re Command Credit Corp, No. 3-8674, 1995 WL 279776, at *2 (SEC Apr. 19, 1995)); see also SEC v. Novus Techs., LLC, Case No. 2:07-CV-235-TC, 2010 U.S. Dist. LEXIS 111851, at *38 (D. Utah Oct. 20, 2010); SEC v. Autocorp Equities, Inc., 292 F. Supp. 2d 1310, 1327 (D. Utah 2003).

5. In order to establish a violation of Section 15(a) of the Exchange Act, the Commission need establish by a preponderance of the evidence that Palmer acted as a broker-dealer in offering and selling National Note securities and that he failed to register with the Commission under Section 15(b). 15 U.S.C. § 78o(b).

6. Based upon the evidence presented, the Court finds that the Commission has met its burden and will enter judgment in favor of Plaintiff on all of its claims.

7. The Court has the authority to grant permanent injunctions against future violations of the federal securities laws. 15 U.S.C. § 77t(b); 15 U.S.C. §78u(d)(1).

8. In assessing the likelihood of future violations, the Court concludes that National Note operated as a Ponzi scheme, Palmer's violations were repeated and egregious, he acted with scienter, and Palmer has failed to acknowledge his wrongdoing, and has given no assurances against future violations.

9. The Court therefore PERMANENTLY ENJOINS Palmer from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a); Section 10(b) of the Exchange Act, 15 U.S.C. §

78j(b); and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5; Section 5(a) and (c) of the Securities Act, 15 U.S.C. § 77e(a), (c); and Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

10. The court has the authority to order the equitable remedy of disgorgement of ill-gotten gains in SEC enforcement actions, along with prejudgment interest on those gains, to prevent unjust enrichment. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1474 (2d Cir. 1996). The amount of disgorgement should include all gains flowing from illegal activities and "need only be a reasonable approximation of profits causally connected to the violation." Id. at 1475 (citation omitted).

11. According to the undisputed evidence presented, Mr. Palmer caused investors to lose $51,936,317.72 through National Note and Palmer misappropriated at least $1,408,022.38 from investors for his own personal gain.

12. The Court therefore ORDERS National Note and Palmer to disgorge the following ill-gotten gains:

    a. $51,936,317.72 in disgorgement as to Defendant National Note, along with prejudgment interest of $13,251,838.11 for a total disgorgement of $65,188,155.83.

    b. $1,408,022.38 in disgorgement as to Defendant Palmer, along with prejudgment interest of $359,264.72 for a total disgorgement of $1,767,287.10.

13. Pursuant to Section 20(d)(2) of the Securities Act and Section 21(d)(3) of the Exchange Act, the Court has the authority to impose civil penalties for violations of the federal securities laws. "Civil penalties are designed to punish the individual violator and deter

future violations of the securities laws." SEC v. Opulentica, LLC, 479 F.Supp.2d 319, 331 (S.D.N.Y. 2007). "Without civil penalties, the only financial risk to violators is the forfeiture of their ill-gotten gains." SEC v. Koenig, 532 F.Supp.2d 987, 995 (N.D. Ill. 2007).

14. Section 20(d) of the Securities Act permits the court to impose a penalty of up to $150,000 on a defendant for each securities violation that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 77t(d)(2)(C)(i), (ii); 17 C.F.R. § 201.1004 (2009) (raising the maximum penalty amount to $ 150,000). On the same basis, Section 21 of the Exchange Act permits the court to impose a penalty of up to $ 150,000 on a defendant for each violation of the securities laws. 15 U.S.C. § 78u(d)(3)(B)(iii)(aa), (bb); 17 C.F.R. § 201.1004 (2009) (raising the maximum penalty amount to $ 150,000).

15. In assessing the appropriateness of a civil penalty, the Court concludes, based on the evidence presented, that the violations were repeated and egregious and were committed with scienter. The Court finds that a penalty of $150,000 against Palmer and National Note for each of the violations alleged in the Complaint is appropriate under the circumstances.

    a. The Court therefore ORDERS the following civil penalties:

b. A civil penalty of $900,000 as to Defendant National Note;

c. A civil penalty of $1,050,000 as to Defendant Palmer.

16. As to each Defendant, let judgment be entered accordingly.

DATED this 30th day of November, 2015.

Honorable Bruce S. Jenkins
Senior District Judge