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Attorneys for Court-Appointed Receiver R. Wayne Klein

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

<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>RECEIVER'S FOURTEENTH MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENTS AND MEMORANDUM IN SUPPORT</p> <p>(Joe Mackey; Stoker & Swinton; Kim and Boni LaValley and VINCI & Associates Retirement Trust; Eric Bawden; JPS/MKS Partners, Ltd.; Karen Thomas Witkamp; Brian A. Spires; Hans Berger and HJB Enterprises, LC; Analee McDonald; and Cedric and Cynthia Johnson)</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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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 A**, approving the below-described Settlement Agreements and Releases

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
- “[P]ursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates[.]”⁸

II.

THE SETTLEMENT AGREEMENTS AND RELEASES

3. As a result of his financial analysis and investigation of the Receivership Defendants conducted to date, the Receiver has determined that he has claims and causes of action against numerous parties related to these parties’ dealings with the Receivership Defendants prior to his appointment.⁹

4. Prior to commencing suit, the Receiver made demand on numerous parties for the return of monies paid to them by the Receivership Defendants. Based on demands made and lawsuits filed and information obtained by the Receiver as part of his investigation, the Receiver

⁵ *Id.* at ¶ 7(C).

⁶ *Id.* at ¶ 7(D).

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 7(J).

⁹ Receiver Declaration ¶ 2.

has entered into numerous settlement agreements, including the ten Settlement Agreements and Releases that are the subject of this Motion discussed in further detail below. As a result of these Settlement Agreements and Releases, the Receivership Estate will receive cash totaling \$304,379.28. The Receivership Estate also has obtained a Promissory Note in the principal amount of \$203,797.83 and has recorded a Deed of Trust against certain real property located in Virginia to secure the that debt.¹⁰

5. Each Settlement Agreement and Release (a) has been negotiated at arm's length and in good faith by the Receiver and the respective parties, (b) will avoid the expense, delay and inherent risks of litigation, (c) will result in the collection of funds or the maximization of assets for the benefit of the Receivership Estate and/or reduction of claims and/or defenses that can be asserted against the Receivership Estate, and (d) where applicable, has taken into account issues related to the collection of any judgment that may be obtained.¹¹

6. The Settlement Agreements and Releases that are the subject of the present Motion, all of which are subject to Court approval, are described as follows:

a. Joe Mackey ("Mackey"): On June 19, 2013, the Receiver filed suit against Mackey, alleging that he was an NNU investor who received a total of \$75,425.47 in excess of his principal investment with NNU. Mackey provided verified financial information to the Receiver asserting an inability to pay any judgment that might be entered against him. The Receiver reviewed the information provided by Mackey and determined, in an exercise of his

¹⁰ Receiver Declaration ¶ 3. The amount that may actually be recovered as a result of secured obligation is uncertain inasmuch as real property is the primary asset to fund payment of the debt and the net sale proceeds from the sale of the real property may be less than the amount of the debt.

¹¹ Receiver Declaration ¶ 4.

business judgment, that a compromise of the amount sought in the Complaint is appropriate. On or about July 6, 2015, the Receiver entered into a Settlement Agreement and Release with Mackey, subject to Court approval, agreeing to compromise the Receivership Estate's claims. Under the Agreement, Mackey will pay \$30,000.00 to the Receivership Estate. Payments will be made monthly in the amount of \$460.00, with a balloon payment of \$11,140.00 due by December 31, 2018. To secure these payments, Mackey has granted the Receivership Estate a Deed of Trust on certain real property that he owns. Upon approval of the Settlement Agreement and Release by this Court, the Receiver will file appropriate papers seeking dismissal of the lawsuit against Mackey.¹²

b. Stoker & Swinton ("SS"): SS provided legal services to NNU prior to the Receiver's appointment, including advice and services relating to a securities offerings and the creation of Assignments of Beneficial Interests. As part of the Receiver's investigation, the Receiver reviewed NNU's internal records and the files maintained by SS relating to services it provided to NNU. The Receiver also participated in the depositions of two SS attorneys. On or about July 9, 2015, prior to commencing any litigation against SS, the Receiver entered into a Settlement Agreement and Release with SS, subject to Court approval, agreeing to release any claims that the Receivership Estate might have against SS in return for a payment of \$95,000.00, which has been paid.¹³

c. Kim and Boni LaValley and VINCI & Associates Retirement Trust (collectively, "LaValley"): On June 21, 2013, the Receiver filed lawsuit against Kim LaValley

¹² Receiver Declaration ¶ 5.

¹³ Receiver Declaration ¶ 6.

and VINCI & Associates Retirement Trust, alleging that these parties had invested with NNU and received a total of \$11,914.49 in excess of the total principal investment. On April 17, 2015, the Receiver filed a Motion for Partial Summary Judgment against the defendants, and after that Motion was filed, LaValley entered into settlement negotiations with the Receiver. On or about July 13, 2015, the Receiver entered into a Settlement Agreement and Release with LaValley (including any and all successor retirement plans), subject to Court approval, agreeing in part to compromise the Receivership Estate's claims in exchange for LaValley agreeing to pay a total of \$9,174.16 to the Receivership Estate. As of this time, this amount has been paid in full. Upon approval of the Settlement Agreement and Release by this Court, the Receiver will file appropriate papers seeking dismissal of the lawsuit against LaValley.¹⁴

d. Eric Bawden ("Bawden"): On June 17, 2013, the Receiver filed a lawsuit against Bawden, alleging that he was an NNU investor who received a total of \$25,943.97 in excess of his principal investment with NNU. On April 17, 2015, the Receiver filed a Motion for Partial Summary Judgment against Bawden, and after that Motion was filed, Bawden entered into settlement negotiations with the Receiver. On or about July 13, 2015, the Receiver entered into a Settlement Agreement and Release with Bawden, subject to Court approval, agreeing in part to compromise the Receivership Estate's claims in exchange for Bawden agreeing to pay a total of \$19,206.85 to the Receivership Estate. As of this time, this amount has been paid in full. Upon approval of the Settlement Agreement and Release by this Court, the Receiver will file appropriate papers seeking dismissal of the lawsuit against Bawden.¹⁵

¹⁴ Receiver Declaration ¶ 7.

¹⁵ Receiver Declaration ¶ 8.

e. JPS/MKS Partners, Ltd. (“JPS”): On June 21, 2013, the Receiver filed a lawsuit against JPS, alleging that it was an NNU investor who received a total of \$40,906.85 in excess of its principal investment with NNU. On April 17, 2015, the Receiver filed a Motion for Partial Summary Judgment against JPS, and after that Motion was filed, JPS entered into settlement negotiations with the Receiver. On or about July 10, 2015, the Receiver entered into a Settlement Agreement and Release with JPS, subject to Court approval, agreeing in part to compromise the Receivership Estate’s claims in exchange for JPS agreeing to pay a total of \$31,498.27 to the Receivership Estate. As of this time, this amount has been paid in full. Upon approval of the Settlement Agreement and Release by this Court, the Receiver will file appropriate papers seeking dismissal of the lawsuit against JPS.¹⁶

f. Karen Thomas Witkamp (“Witkamp”): On June 24, 2013, the Receiver filed a lawsuit against Witkamp, alleging that she was an NNU investor who received a total of \$90,592.31 in excess of her principal investment with NNU. On April 17, 2015, the Receiver filed a Motion for Partial Summary Judgment against Witkamp, and after that Motion was filed, Witkamp entered into settlement negotiations with the Receiver. Witkamp provided a sworn financial statement to the Receiver, asserting an inability to pay any judgment that might be entered against her. The Receiver reviewed the information provided by Witkamp and determined, in an exercise of his business judgment, that a compromise of the amount sought in the Complaint is appropriate. On or about July 23, 2015, the Receiver entered into a Settlement Agreement and Release with Witkamp, subject to Court approval, agreeing in part to compromise the Receivership Estate’s claims in exchange for Witkamp agreeing to pay a total of

¹⁶ Receiver Declaration ¶ 9.

\$70,000.00 to the Receivership Estate. Under the Settlement Agreement, Witkamp has already paid \$20,000.00 and will make annual payments of \$12,500.00 by no later than the end of each calendar year commencing in December 2015 through December 2018. Upon approval of the Settlement Agreement and Release by this Court and payment of the settlement amount, the Receiver will file appropriate papers seeking dismissal of the lawsuit against Witkamp.¹⁷

g. Brian A. Spires (“Spires”): On June 21, 2013, the Receiver filed a lawsuit against Spires, alleging that he was an NNU investor who received a total of \$29,661.47 in excess of his principal investment with NNU. On April 24, 2015, the Receiver filed a Motion for Partial Summary Judgment against Spires, and after that Motion was filed, Spires entered into settlement negotiations with the Receiver. Spires provided a sworn financial statement to the Receiver, asserting an inability to pay any judgment that might be entered against him. The Receiver reviewed the information provided by Spires and determined, in an exercise of his business judgment, that a compromise of the amount sought in the Complaint is appropriate. On or about July 28, 2015, the Receiver entered into a Settlement Agreement and Release with Spires, subject to Court approval, agreeing in part to compromise the Receivership Estate’s claims in exchange for Spires agreeing to pay a total of \$21,000.00 to the Receivership Estate. As of this time payment has been made in full. Upon approval of the Settlement Agreement and Release by this Court, the Receiver will file appropriate papers seeking dismissal of the lawsuit against Spires.¹⁸

¹⁷ Receiver Declaration ¶ 10.

¹⁸ Receiver Declaration ¶ 11.

h. Hans Berger and HJB Enterprises, LC (collectively, “Berger”): The Receiver filed a lawsuit against Hans Berger on June 21, 2013, alleging that he was an NNU investor who received a total of \$20,381.92 in excess of his principal investment. Subsequently, in response to Hans Berger’s Motion to Dismiss, the Receiver’s Complaint was amended to name HJB Enterprises, LC as a defendant. On or about July 31, 2015, the Receiver entered into a Settlement Agreement and Release with Berger, subject to Court approval, agreeing in part to compromise the Receivership Estate’s claim against Berger in exchange for Berger agreeing to pay a total of \$20,000.00 to the Receivership Estate over time. Berger will pay \$2,000.00 a month for a total of ten months, commencing on July 31, 2015. The last payment is due by no later than April 30, 2016. To date, Berger has paid \$2,000.00 of the settlement amount. Upon approval of the Settlement Agreement and Release by this Court and payment of the full settlement amount, the Receiver will file appropriate papers seeking dismissal of the lawsuit against Berger.¹⁹

i. Analee McDonald (“McDonald”): On June 19, 2013, the Receiver filed a lawsuit against McDonald, alleging that she was an NNU investor who received a total of \$10,283.44 in excess of her principal investment with NNU. On June 18, 2015, the Court in that suit entered an Order Granting the Receiver’s Motion for Partial Summary Judgment, ordering that the Receivership Estate is entitled to recover \$10,283.44 from McDonald. Thereafter, McDonald provided verified financial information to the Receiver asserting an inability to pay this amount. The Receiver reviewed the information provided by McDonald and determined, in an exercise of his business judgment, that a compromise of the judgment is appropriate. On or

¹⁹ Receiver Declaration ¶ 12.

about July 31, 2015, the Receiver entered into a Settlement Agreement and Release with McDonald, subject to Court approval, agreeing in part to compromise the Receivership Estate's claims and McDonald agreeing to pay a total of \$8,500.00 to the Receivership Estate over time and executing a Confession of Judgment to be held by the Receiver pending payment of the full settlement amount. Under the Agreement, an initial payment in the amount of \$4,000.00 was due on July 31, 2015, and thereafter McDonald must make monthly payments of \$187.50 each month through July 2017. As of this time, McDonald has paid \$4,000.00 as required under the Agreement.²⁰

j. Cedric and Cynthia Johnson (the "Johnsons"): On June 30, 2014, the Receiver filed a lawsuit against the Johnsons, alleging that they received a total of \$203,797.83 in commissions and false profits from NNU as well as Assignments of Beneficial Interests against Lot 37, Elkhorn Ridge Estates and against several units of the Expressway Business Park Condominiums (the "ABIs"). The Receiver sought to recover the commissions and false profits and to invalidate the ABIs. Thereafter, the Johnsons provided verified financial information to the Receiver asserting an inability to pay any judgment that might be entered against them. The Receiver reviewed this information and determined that although the Johnsons did not have liquid assets available to satisfy a judgment at this time, they owned assets from which at least part of a judgment could be satisfied. On or about August 10, 2015, the Receiver entered into a Settlement Agreement and Release with the Johnsons, subject to Court approval, agreeing in part to compromise the Receivership Estate's claims. Under the Agreement, the Johnsons have released their ABIs, and have provided the following to the Receiver for the benefit of the

²⁰ Receiver Declaration ¶ 13.

Receivership Estate: (i) a Secured Promissory Note, (ii) a Deed of Trust against certain real property located in Hamilton, Virginia, and (iii) a Confession of Judgment in the amount of \$163,038.00 which the Receiver may file. Under the Secured Promissory Note, the Johnsons have promised to pay \$203,797.83, plus interest at an annual rate of 2.0%, upon demand or the sale of the real property secured by the Deed of Trust.²¹

III.

APPLICABLE LAW AND ANALYSIS

7. The Receiver requests that the Court approve the above-described Settlement Agreements and Releases. In support hereof, the Receiver provides the following analysis.

8. Courts recognize that a “receiver has the power, when so authorized by the court, to compromise claims either for or against the receivership and whether in suit or not in suit.”²²

9. “In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.”²³ The Tenth Circuit has explained:

In assessing whether the settlement is fair, reasonable and adequate the trial court should consider: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and

²¹ Receiver Declaration ¶ 14.

²² *Sec. & Exch. Comm’n v. Credit Bankcorp, Ltd.*, No. 99 CIV. 11395, 2001 WL 1658200, at *2 (S.D.N.Y. Dec. 27, 2001) (quoting 3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d Ed. 1959)).

²³ *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); see also *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).

expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.²⁴

10. Here, each Settlement Agreement and Release is fair, reasonable and adequate for at least the following reasons: (a) they were fairly and honestly negotiated at arm's length and in good faith by the parties; (b) the value of an immediate recovery outweighs the mere possibility of future relief after potentially protracted and expensive litigation; and (c) the terms of the respective proposed settlements are fair and reasonable.²⁵

11. Each of the Settlement Agreements, which were all negotiated in good faith and at arms' length, are beneficial to the Receivership Estate, and the Receiver respectfully submits that each should be approved by the Court.²⁶

12. Mackey: The Settlement Agreement and Release with Mackey will result in a settlement payment that is approximately 40% of the amount demanded by the Receiver. The Receiver entered into this Settlement Agreement and Release based on Mackey's financial condition and on obtaining a Deed of Trust to secure the payments that will be made by Mackey over a period approximately three years. If Mackey fails to make payments required under the Settlement Agreement and Release, the Receivership Estate will have a claim in the full amount demanded in the lawsuit, less payments made, that may be satisfied by Mackey's real property. Accordingly, the Receiver submits that the Settlement Agreement and Release with Mackey is beneficial to and in the best interests of the Receivership Estate.²⁷

²⁴ *Jones*, 741 F.2d at 324.

²⁵ Receiver Declaration ¶¶ 5-14.

²⁶ Receiver Declaration ¶ 15.

²⁷ Receiver Declaration ¶ 16.

13. SS: The Receiver conducted an extensive investigation into the legal services SS provided to NNU. SS cooperated fully during the Receiver's investigation, responding to questions and providing access to files. While the Receiver asserted that the Receivership Estate had claims against SS related to its role in this case, SS denied any knowledge of fraud and that it had any liability for the asserted claims. As a result, litigation likely would have been protracted and expensive and obtaining a judgment was not certain. In the Receiver's business judgment, having assessed potential litigation costs and risks, the Settlement Agreement and Release negotiated with SS is beneficial to and in the best interest of the Receivership Estate. The Receivership Estate has received \$95,000.00 without incurring any further expense or risk.²⁸

14. LaValley, Bawden, and JPS: Collectively, the Settlement Agreements and Releases obtained with these parties result in settlement payments in the total amount of \$59,879.28 to the Receivership Estate, and each represents a recovery of approximately 77% of the amounts sought in the respective lawsuits. While the Receiver is confident that he would have prevailed and obtained a judgment against each of the defendants, he determined that settlement at the agreed amounts was appropriate given the inherent risks of litigation and the expense that would have been necessary to obtain and collect judgments against each of these defendants. Accordingly, the Receiver submits that the Settlement Agreements and Releases with these parties are beneficial to and in the best interest of the Receivership Estate.²⁹

15. Witkamp: The Settlement Agreement and Release with Witkamp, who is Palmer's sister, will result in a settlement payment that is slightly more than 77% of the amount

²⁸ Receiver Declaration ¶ 17.

²⁹ Receiver Declaration ¶ 18.

demand from Witkamp. The Receiver entered into this Settlement Agreement and Release based on Witkamp's financial condition, based on the Receiver's understanding that at least part of the payments will be funded by Witkamp's husband's retirement funds, and considering the inherent risks of and expense of litigation. Accordingly, the Receiver submits that the Settlement Agreement and Release with Witkamp is appropriate and beneficial to and in the best interests of the Receivership Estate.³⁰

16. Spires: The Settlement Agreement and Release with Spires will result in a settlement payment that is slightly more than 70% of the amount demanded by the Receiver. The Receiver entered into this Settlement Agreement and Release based on Spires's financial condition, based on the Receiver's understanding that Spires will fund part of his settlement payments by borrowing against a retirement account that may otherwise be exempt in bankruptcy, and given the inherent risks of and expense of litigation. Accordingly, the Receiver submits that the Settlement Agreement and Release with Spires is beneficial to and in the best interests of the Receivership Estate.³¹

17. Berger: The Settlement Agreement and Release with Berger will result in a total settlement payment that is more than 98% of the amount sought by the Receiver. While the settlement payment will be made over time and will end in April 2016, the delay is not more than if the Receiver had litigated this case and avoids the expense and inherent risks of litigation.

³⁰ Receiver Declaration ¶ 19.

³¹ Receiver Declaration ¶ 20.

Thus, the Receiver submits that the Settlement Agreement and Release with Berger is beneficial to and in the best interests of the Receivership Estate.³²

18. McDonald: The Settlement Agreement and Release with McDonald will result in a total settlement payment that is 82% of the judgment against her. In light of McDonald's financial condition and the collection costs that would have been required, the Receiver submits that the Settlement Agreement and Release is beneficial to and in the best interests of the Receivership Estate.³³

19. Johnsons: The Settlement Agreement and Release with the Johnsons will result in the Johnsons' release of ABIs, and the Receivership Estate holding a secured claim against the Johnsons' real property that they are in the process of selling. The Receiver understands that upon the sale of the property the Receivership Estate will receive at least a portion of the \$203,797.83 that has been demanded, and if that full amount is not paid, the Estate will have a Confession of Judgment in the amount of \$163,038.00. In light of Johnsons' financial situation, the inherent risks of and cost of litigation and collection, the Receiver submits that the Settlement Agreement and Release with the Johnsons is beneficial to and in the best interests of the Receivership Estate.³⁴

20. Each Settlement Agreement and Release was negotiated fairly and honestly, and is the result of an arm's-length transaction. There has been no collusion between the parties.³⁵

³² Receiver Declaration ¶ 21.

³³ Receiver Declaration ¶ 22.

³⁴ Receiver Declaration ¶ 23.

³⁵ Receiver Declaration ¶ 24.

21. In light of these factors, the Receiver believes each Settlement Agreement and Release is just, fair and beneficial to the Receivership Estate. Accordingly, the Settlement Agreements and Releases should be approved.³⁶

IV.

CONCLUSION

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit A**, approving each Settlement Agreement and Release described above.

DATED this ___ day of August, 2015.

DORSEY & WHITNEY LLP

 /s/ Peggy Hunt

Peggy Hunt
Chris Martinez

Attorneys for Receiver

³⁶ Receiver Declaration ¶ 25.

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S FOURTEENTH MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENTS AND MEMORANDUM IN SUPPORT** (the "Motion") was filed with the Court on this 24th day of August, 2015, and served via ECF on all parties who have requested notice in this case.

Furthermore, I certify that on the 24th day of August, 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

Cedric and Cynthia Johnson
39945 Charles Town Pike
Hamilton, Virginia 20158

Joe Mackey
Kim and Boni LaValley and VINCI & Associates Retirement Trust
Eric Bawden
JPS/MKS Partners, Ltd.
Karen Thomas Witkamp
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/s/ Candy Long