

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](mailto:hunt.peggy@dorsey.com)

[martinez.chris@dorsey.com](mailto: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;">Defendant.</p>	<p style="text-align: center;"><b>MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT (LISA SANDERS SHAH)</b></p> <p style="text-align: center;">Civil No. 2:14-cv-00614</p> <p style="text-align: center;">The Honorable Bruce S. Jenkins</p>
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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) (Jenkins, J.) (the “Civil Enforcement Action”), by and through his counsel of record, hereby files this *Motion for Summary Judgment and Memorandum in Support (Lisa Sanders Shah)* (the “Motion”) against Defendant Lisa Sanders Shah (the “Defendant”).

This Motion is supported by the *Declaration of Receiver R. Wayne Klein* (the “Klein Declaration”), a true and correct copy of which is attached hereto as **Exhibit A**. 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 purported to afford these select investors with security for monies owed under the promissory notes through an interest in a deed of trust held by NNU. Defendant Lisa Sanders Shah is one of these investors. Yet, the ABIs, including the Defendant’s ABI, were a sham -- they have no legal effect and are invalid as a matter of law. Accordingly, the Receiver requests that the Court enter judgment on his First Claim for Relief, declaring that the Defendant’s ABI is 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 Palmer operated National Note as a Ponzi scheme and asserting causes of action for securities fraud.<sup>1</sup>

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

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<sup>1</sup> Civil Enforcement Case, Docket No. 1.

and creating the Receivership Estate, which includes National Note and its subsidiaries and affiliates.<sup>2</sup>

3. As described in greater detail below, the Defendant was an investor in National Note.<sup>3</sup>

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

5. This Motion asks the Court to enter a judgment declaring the Defendant's ABI 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.<sup>5</sup>

A promissory note is a negotiable instrument that can only be transferred by delivery of the promissory note itself to the transferee.<sup>6</sup>

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<sup>2</sup> Civil Enforcement Case, Docket No. 9 (Receivership Order), a copy of which is attached as Exhibit 1 to the Klein Declaration.

<sup>3</sup> Klein Declaration ¶ 4.

<sup>4</sup> Complaint, Docket No. 2. <https://ecf.utd.uscourts.gov/doc1/18302852952>

<sup>5</sup> 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)).

<sup>6</sup> Restatement Third of Property (Mortgages) § 5.4; Utah Code Ann. §§ 70A-3-104 and 70A-3-203.

**B. Material Facts Necessary to Meet the Elements:**

*Relevant Homeland Funding – National Note Transactions*

1. Homeland Development II, LLC (“Homeland Development”) is an affiliate of National Note and is one of the numerous entities subject to the Receivership Order.<sup>7</sup>
2. Pursuant to a Commercial Trust Deed Note dated November 10, 2006 National Note purported to lend funds to Homeland Development (the “Homeland Development Note”).<sup>8</sup>
3. Homeland Development executed a Deed of Trust dated November 10, 2006 in conjunction with the Homeland Development Note (the “Homeland Development Deed of Trust”), purporting to give National Note a secured interest in certain real property located in Maricopa County, Arizona (the “Maricopa Property”).<sup>9</sup> The Homeland Development Deed of Trust is recorded in Maricopa County, Arizona at Entry No. 2006-1487395A.<sup>10</sup>

*The Lisa Sanders Shah ABI*

4. In 2010, Defendant invested the principal amount of \$400,000. This investment balance was memorialized by a Promissory Note dated August 6, 2010 (the “Shah Note”).<sup>11</sup>
5. National Note executed an “Assignment of Beneficial Interest in Trust Deed for Security” dated October 1, 2010, in favor of Defendant (the “Shah ABI”), which states in part as follows:

For value received, and to secure the payment of [the Shah Note], the undersigned Assignor, National Note of Utah, L.C., hereby assigns to the Assignee(s), Lisa Sanders

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<sup>7</sup> Klein Declaration ¶ 5 & Exhibit 1 (Receivership Order, at pp. 1-3).

<sup>8</sup> *Id.* ¶ 6 & Exhibit 2 (Homeland Development Note).

<sup>9</sup> *Id.* ¶ 7 & Exhibit 3 (Homeland Development Deed of Trust).

<sup>10</sup> *Id.*, Exhibit 3 (Homeland Development Deed of Trust).

<sup>11</sup> Klein Declaration ¶ 8 & Exhibit 4 (Shah Note).

Shah, an undivided \$400,000.00 of Assignor’s right, title and interest in and to the beneficial interest in that certain Trust Deed dated November 10, 2006. . .<sup>12</sup>

6. Thus, by the express terms of the Shah ABI, the Defendant received an interest in National Note’s interest in the Homeland Development Deed of Trust.<sup>13</sup>

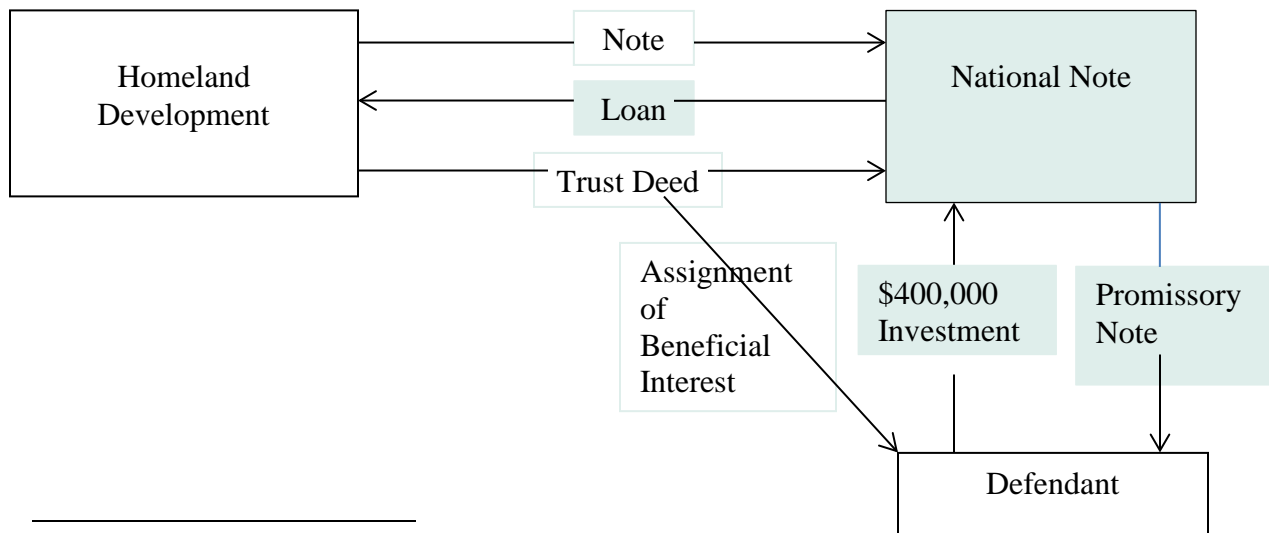
7. National Note did not execute any assignment of its interest in the Homeland Development Note to the Defendant.<sup>14</sup>

8. National Note did not deliver the original Homeland Development Note to the Defendant.<sup>15</sup>

9. There is no indorsement of the Homeland Development Note to the Defendant on the Homeland Development Note.<sup>16</sup>

10. Homeland Development is not a party to the Shah ABI.<sup>17</sup>

11. The following graph illustrates the transaction:



<sup>12</sup> Klein Declaration ¶ 9 & Exhibit 5 (Shah ABI).

<sup>13</sup> See *id.*, Exhibit 5 (Shah ABI).

<sup>14</sup> *Id.* ¶10.

<sup>15</sup> *Id.* ¶ 11.

<sup>16</sup> *Id.* ¶ 12.

<sup>17</sup> *Id.*, Exhibit 5 (Shah ABI).

12. The Shah ABI has been filed in Maricopa County, Arizona at Entry No. 20100858603.<sup>18</sup>

#### **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, 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 Shah ABI is invalid as a matter of law.

##### **B. The Shah ABI is Void As a Matter of Law.**

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.”<sup>19</sup> Thus, “[a]n assignment of the deed of trust separate from the note has no ‘force’”<sup>20</sup>— if the note is not also assigned, the assignment of the deed of trust is, for all practical purposes, ineffectual

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<sup>18</sup> *Id.*, Exhibit 5 (Shah ABI).

<sup>19</sup> *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.”).

<sup>20</sup> *Bellistri*, 284 S.W.3d at 623.

because the note and deed of trust have become split.<sup>21</sup>

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.”<sup>22</sup>

Here, it is undisputed that National Note has not assigned any interest that it has in the Homeland Development Note to the Defendant. Rather, by the express terms of the Shah ABI, National Note only assigned to the Defendant its beneficial interest in the Homeland Development Deed of Trust.

In addition, there was no transfer of the Homeland Development Note as a matter of law because the Note is a negotiable instrument and the Uniform Commercial Code “is generally understood to make the right of enforcement of [a negotiable note] transferrable only by delivery of the instrument itself to the transferee.”<sup>23</sup> [Utah Code Ann. § 70A-3-203\(1\)](#) codifies this rule, stating that a transfer of a note only occurs “when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.”<sup>24</sup>

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<sup>21</sup> *Id.* at 624.

<sup>22</sup> [Utah Code Ann. § 70A-9a-109](#), Official Comment 7.

<sup>23</sup> Rest. (3d) of Property (Mortgages) §5.4, cmt (c).

<sup>24</sup> *Accord* Rest. (3d) of Property (Mortgages) §5.4, cmt (c).

Furthermore, negotiation of a note “does not occur until” an “indorsement is made” on the note.<sup>25</sup>

The Homeland Development Note is a negotiable note under Utah Code Ann. § 70A-3-104, which defines a “negotiable note” to be an (1) unconditional promise to pay a fixed amount of money, with or without interest, (2) that is payable to bearer or to order at the time it is issued, (3) is payable on demand or at a definite time, and (4) does not obligate the promissor to do any act other than pay money. Specifically, the Homeland Development Note is an unconditional promise by Homeland Development to pay National Note \$3,000,000.<sup>26</sup> The \$3,000,000 is payable to the “order” of National Note, or to anyone to whom the Note is transferred, and the Homeland Development Note is payable at a definite time, namely, the “first day of each month, starting on 12/1/2006.”<sup>27</sup> Finally, the Homeland Development Note does not obligate Homeland Development to do anything other than pay money to National Note.<sup>28</sup> Being a negotiable instrument under section 70A-3-104, any interest in the Homeland Development Note could only be made by transferring the Note to the Defendant and indorsing the Note to the Defendant. It cannot be disputed that in this case Homeland Development neither delivered the Homeland Development Note to the Defendant nor indorsed it in favor of the Defendant.<sup>29</sup> Accordingly,

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<sup>25</sup> Utah Code Ann. §70A-3-203(3).

<sup>26</sup> Receiver Declaration, Exhibit 2 (Homeland Development Note). *See* Utah Code Ann. § 70A-3-106(2) (the promise is not made conditional by a reference to the Homeland Development Deed of Trust related to rights with respect to collateral, prepayment or acceleration).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The Homeland Development Note also requires that Homeland Development preserve ownership of Maricopa Property by meeting all other obligations that may affect ownership of that Property. A note may contain these obligations without affecting the note’s status as a negotiable instrument. *See* Utah Code Ann. § 70A-3-104(1)(v)(i).

<sup>29</sup> Receiver Declaration ¶¶ 11 -12.





**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 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.

/s/ Chris Martinez