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Attorneys for Court-Appointed Receiver R. Wayne Klein

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

NATIONAL NOTE OF UTAH, LC, a Utah
Limited Liability Company and WAYNE
LaMAR PALMER, an individual,

Defendants.

**RECEIVER'S MOTION SEEKING
APPROVAL OF SETTLEMENT
AGREEMENT WITH FRED MYER
AND MEMORANDUM IN SUPPORT**

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

The Honorable Bruce S. Jenkins

R. Wayne Klein, as receiver (the "Receiver") for Defendant National Note of Utah, LC, and the assets of Defendant Wayne LaMar Palmer, by and through his counsel of record, respectfully requests that the Court enter an Order granting the Motion and approving the settlement agreement discussed below with Defendant Fred Myer ("Myer"). This Motion is supported by the *Memorandum of Law* contained herein and the *Declaration of R. Wayne Klein*,

Receiver, (the “Receiver Declaration”), attached hereto as **Exhibit A**. A proposed form of Order is attached hereto as **Exhibit B**.

I.

BACKGROUND

General

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 AGREEMENT AND RELEASE

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 ¶ 3.

has entered into numerous settlement agreements, including the Myer Settlement Agreement and Release discussed in further detail below.¹⁰ This is the second settlement agreement that has been negotiated with Myer. The Receiver previously requested approval of an agreement with Myer that conditioned Myer's payment to the Receivership Estate upon the occurrence of certain future events. The Court denied the Receiver's request and expressed concern about the contingencies in the agreement. The Receiver then negotiated the current Settlement Agreement and Release with Myer, which provides for an unconditional payment from Myer to the Receivership Estate that is not contingent on future events. The Receiver believes the current agreement addresses and resolves the prior concerns of the Court.¹¹

5. The Settlement Agreement and Release (a) has been negotiated at arm's length and in good faith by the Receiver and Myer, (b) will avoid the expense, delay and inherent risks of litigation, (c) will result in the collection of funds, and (d) has taken into account issues related to the collection of any judgment that may be obtained.¹²

6. The Settlement Agreement and Release subject to the present Motion is described as follows:

- a. Fred Myer ("Myer"): On June 19, 2013, the Receiver filed suit against Myer, alleging that he was an NNU investor who received a total of \$10,708.86 in excess payments from the Receivership Entities. Myer disputes any obligation to repay the amounts Myer received. On or about July 6, 2016, the Receiver entered

¹⁰ Receiver Declaration ¶ 4.

¹¹ Receiver Declaration ¶ 5.

¹² Receiver Declaration ¶ 6.

into a Settlement Agreement and Release with Myer, subject to Court approval, agreeing in part to compromise the Receivership Estate's claim against Myer. Under the Agreement, Myer will pay \$2,000.00 to the Receivership Estate. The Settlement Agreement and Release also includes mutual releases of claims. Upon approval of the Settlement Agreement and Release by this Court, the Receiver will file appropriate papers seeking to dismiss the lawsuit against Myer.¹³

III.

APPLICABLE LAW AND ANALYSIS

7. The Receiver requests that the Court approve the above-described Settlement Agreement and Release with Myer. 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."¹⁴

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."¹⁵ 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

¹³ Receiver Declaration ¶ 7.

¹⁴ *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)).

¹⁵ *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).

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 expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.¹⁶

10. Here, the Settlement Agreement and Release is fair, reasonable, and adequate for at least the following reasons: (a) it was 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 proposed settlement are fair and reasonable.¹⁷

11. The Settlement Agreement and Release is beneficial to the Receivership Estate and the Receiver respectfully submits that it should be approved by the Court.

- a. Myer: The Receiver engaged in good faith and arms' length negotiations with Myer and has obtained a total of \$2,000.00 in cash for the benefit of the Receivership through the proposed Settlement Agreement and Release. While the Receiver believes he would prevail in litigation and obtain judgment for the full amount, the particular facts in Myer's case and the positions being taken by Myer would require the Receiver to expend significant additional effort and cost to obtain judgment for the full amount. As such, the costs of litigation would likely exceed any excess recovery for the Receivership Estate. Therefore, the Receiver

¹⁶ *Jones*, 741 F.2d at 324.

¹⁷ Receiver Declaration ¶ 8-9.

submits that this Settlement Agreement and Release is in the best interest of the Receivership Estate.¹⁸

12. The 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.¹⁹

13. In light of these factors, the Receiver believes that the Settlement Agreement and Release is just and fair and should be approved by the Court.

IV.

CONCLUSION

For the reasons stated herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit B**, approving the Settlement Agreement and Release described above.

DATED this 21st day of July, 2016.

DORSEY & WHITNEY LLP

/s/ Chris Martinez
Peggy Hunt
Chris Martinez
Megan K. Baker
Attorneys for Receiver

¹⁸ Receiver Declaration ¶ 10.

¹⁹ Receiver Declaration ¶ 11.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2016, the foregoing **RECEIVER'S MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENT WITH FRED MYER AND MEMORANDUM IN SUPPORT** was filed with the Court and served via ECF on all parties who have requested notice in this case.

/s/ Monica Posada _____

Furthermore, I hereby certify that on the 21st day of July, 2016, a true and correct copy of the foregoing **RECEIVER'S MOTION SEEKING APPROVAL OF SETTLEMENT AGREEMENT WITH FRED MYER AND MEMORANDUM IN SUPPORT** was served upon the person named below, at the address set out below by U.S. mail:

Wayne L. Palmer
8816 South 2240 West
West Jordan, UT 84088

/s/ Monica Posada _____