

Peggy Hunt (Utah State Bar No. 6060)
John J. Wiest (Utah State Bar No. 15767)
DORSEY & WHITNEY LLP
111 South Main Street, 21st Floor
Salt Lake City, UT 84111-2176
Telephone: (801) 933-7360
Facsimile: (801) 933-7373
Email: hunt.peggy@dorsey.com
wiest.john@dorsey.com

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 AMENDED MOTION
SEEKING AUTHORIZATION TO
MAKE SECOND DISTRIBUTION**

Civil No. 2:12-00591

The Honorable Bruce S. Jenkins

R. Wayne Klein, as receiver (the “Receiver”) for National Note of Utah, LC and its affiliated entities (“National Note”) and the assets of Defendant Wayne LaMar Palmer, by and through his counsel of record, hereby requests that the Court enter an Order authorizing the Receiver to make a second distribution pursuant to the distribution methodology that this Court has approved in this case to the holders of Allowed Claims eligible for a rising tide distribution as set forth in Column J of **Exhibit A** attached hereto and as discussed in further detail below. This Motion amends the *Receiver’s Motion Seeking Authorization to Make Second Distribution*

filed on May 16, 2018,¹ to address concerns raised by the Court at hearings held on June 6 and 8, 2018. In support hereof, the Receiver states as follows.

I.

BACKGROUND

The Initial Order Approving Distribution Methodology and an Initial Distribution

1. On November 8, 2016, after notice to all parties in interest and opportunity to be heard, the Court entered an *Order Granting Receiver’s Motion for Approval of (1) Proposed Distribution Methodology and Plan of Distribution, and (2) Proposed Initial Distribution as Modified* (the “Initial Order”)² which, among other things, approved the Receiver’s proposed methodology for distributing funds of the Receivership Estate to holders of “Allowed Claims” (the “Approved Methodology”), and authorized the Receiver to make an “Initial Distribution” in the total amount of \$4.5 million to holders of Allowed Claims plus an additional \$26,507.28 on account of settlements of objections and late-filed Proofs of Claim.

2. Allowed Claims in this case are limited to each holder’s “Net Principal Investment”—which is calculated by the sum of all cash invested by the claimant with National Note, less all cash paid to the claimant by National Note prior to the commencement of the above-captioned case. Each holder of an Allowed Claim is assigned a “Pre-Receivership Percentage Return” which is the percentage return that was paid on the claimant’s Net Principal Investment prior to the commencement of this case. Investors were informed of their allowed

¹ Docket No. 1379.

² Docket No. 1231.

Net Principal Investment and their Pre-Receivership Percentage Return in the motion that was granted as part of the Initial Order.³

3. The Approved Methodology allowed all claimants in this case to receive a one-time *pro rata* distribution from \$1.5 million on account of their respective Allowed Claims as part of the Initial Distribution. *Pro rata* distributions were calculated by dividing \$1.5 million by \$48,343,654.85, which was the total amount of Allowed Claims plus the face amount of three disputed claims.

4. In addition, the Approved Methodology provides that for all distributions over that initial \$1.5 million, a “rising tide” method of distribution must be applied. This method requires available cash of the Receivership Estate to be distributed first to those holders of Allowed Claims whose Pre-Receivership Percentage Return was zero or less than 20.05% prior to the filing of the above-captioned case. Once receivership distributions helped these holders “catch up” with holders who received a higher Pre-Receivership Percentage Return, any available additional funds must be paid to the next lowest Pre-Receivership Percentage Return tier.

5. Paragraph (2) of the Initial Order expressly states: “The distribution methodology for this initial distribution and for all future distributions made by the Receiver in this cases as outlined in the Distribution Motion is **APPROVED.**”

The Initial Distribution

6. The Receiver distributed a total of \$4,526,507.28 pursuant to the Approved Methodology as part of the Initial Distribution.

³ See Order Granting Receiver’s Motion for Approval of (1) Proposed Distribution Methodology and Plan of Distribution, and (2) Proposed Initial Distribution as Modified, Docket No. 1196.

7. Specifically, \$1.5 million plus amounts approved by the Court on account of corrections, late-filed Proofs of Claim and resolution of claim objections was distributed *pro rata* to each holder of an Allowed Claim.

8. Additionally, \$3 million plus amounts approved by the Court on account of corrections, late-filed Proofs of Claim, and resolution of claim objections was distributed on the rising tide basis to holders of Allowed Claims who had a Pre-Receivership Percentage Return of zero up to 20.05%. Thus, as a result of the Initial Distribution, all National Note claimants have received back at least 20.05% of their Net Principal Investment. This amounts to 214 of the total 438 claimants receiving a rising tide distribution.⁴

9. At the time of the Initial Distribution, there were a total of four disputed Proofs of Claim. The Receiver reserved the funds that would have been paid to each of these claimholders as part of the Initial Distribution, pending a resolution of disputes related to their claims. At this time, all of the originally-disputed claims have been allowed in whole or in part, and the Receiver has made an Initial Distribution to these claimants from the reserved funds.

10. Distributions made to each holder of an Allowed Claim in the Initial Distribution are included in the chart attached hereto as **Exhibit A** at Columns F and G.

Funds Available and Proposed Second Distribution

11. As of May 8, 2018, approximately \$2.3 million is on deposit in the Receivership Estate's Operating Account. This includes (a) funds that were on deposit in the Receivership Estate's Real Estate Holding Account that were transferred to the Operating Account when all disputes related to certain Assignments of Beneficial Interests were finally resolved, and (b)

⁴ See Exh. A.

\$8,000.00 that the Receiver has left on deposit in the Real Estate Holding Account in the event that this Account is necessary to deal with remaining property sales of the Receivership Estate.

12. In an exercise of his business judgment, the Receiver believes that it is prudent at this time to make a second distribution in the total amount of \$2,005,394.41 to holders of Allowed Claims in accordance with the Approved Methodology. In so doing, the Receiver would make rising tide distributions to those holders of Allowed Claims whose total return of Net Principal Investment after the Initial Distribution is 27.57% or less. If allowed, a total of 228 of the total 438 holders of Allowed Claims will receive a rising tide distribution after this second distribution.

13. The amount now proposed for distribution is \$5,394.41 more than represented in the Receiver's original Motion, which requested authority make a second distribution in the amount of \$2 million. After that Motion was filed, the Receiver discovered that he would be required to increase distributions to 3 holders of Allowed Claims to return 27.57% of their Net Principal Investment. These include Proofs of Claim Nos. 1464 (McCullough), 1375 (Blackwell) and 1395 (Brasher). In the original Motion, the Receiver inadvertently recorded Claim No. 1464 in the amount of \$40,543.00, when the allowed amount of the claim is actually \$57,564.50. To correct this error, the Receiver is proposing distributing \$1,286.20 more than he originally proposed so that Mr. McCullough receives a return of 27.57% of his Net Principal Investment. Additionally, adjustments were required to the distributions on account of Claim Nos. 1375 and 1395 to accurately reflect the intent of the settlements approved by the Court. With these adjustments, Ms. Brasher will receive an additional \$3,994.65 as part of the second distribution, and Ms. Blackwell will receive an additional \$113.56.

14. The amount of the proposed distribution was conservatively calculated by the Receiver to take into account remaining costs of administering the Receivership Estate, including but not limited to costs associated with selling the remaining properties, costs associated with settlements of remaining deeds of trust against certain properties, costs of collecting judgments and settlements, and general costs of administration, including closing the Receivership Estate.

15. Distributions proposed to be made to each holder of an Allowed Claim as part of the second distribution are included in the chart attached hereto as **Exhibit A** at Column J.

Anticipated Future Distributions

16. The Receiver is working diligently to finalize his administration of the Receivership Estate. At this time, the Receiver has limited real property left to sell, and has a limited amount of judgments and settlements to collect. Given the resolution of the litigation related to the disallowance of Assignments of Beneficial Interests, the Receiver is now considering alternative options for the sale of the remaining real property and monetizing the judgments obtained.

17. He anticipates that there will be sufficient additional funds to distribute as part of his closing of the Receivership Estate and, therefore, anticipates at least one more distribution before the Estate is closed.

II.

RELIEF REQUESTED

18. The Receiver requests an Order granting this Motion and authorizing him to make a second distribution in the total amount of \$2,005,394.41 in accordance with the Approved Methodology that this Court ordered to be applied in the Initial Order.

19. Under the Approved Methodology, if this Motion is granted, a rising tide distribution to those holders of Allowed Claims who have received 27.57% or less of their Net Principal Investment will be made by the Receiver.

20. Attached hereto as **Exhibit A** is a chart identifying, among other things, the claims entitled to a rising tide distribution as part of the proposed second distribution. All holders of Allowed Claims receiving a distribution as part of the second distribution are identified in Column J.

21. Furthermore, to address issues raised by the Court, the Receiver has now disclosed the following information in **Exhibit A**:⁵

Column A	Proof of Claim number
Column B	Total amount claimant paid to National Note
Column C	Total amount National Note paid to claimant before Receiver's appointment
Column D	The net amount of Columns B and C, which is the Net Principal Investment, or the amount of the claimholder's Allowed Claim
Column E	The Pre-Receivership Percentage Return of the Net Principal Investment on which rising tide distributions are based
Column F	The one-time <i>pro rata</i> distribution of \$1.5 million plus amounts approved by the Court on account of corrections, late-filed Proofs of Claim and resolution of objections made as part of the Initial Distribution to every holder of an Allowed Claim
Column G	The rising tide distribution of \$3 million plus amounts approved by the Court on account of corrections, late-filed Proofs of Claim and resolution of objections of the Initial Distribution to those holders of Allowed Claims

⁵ In previous papers filed with the Court, the Receiver only described the distributions made or proposed to be made. The Receiver did not describe the basis for the distributions because he was concerned it may be confusing to those holders of Allowed Claims who were only interested in understanding the amount of their respective distributions. The Receiver, however, appreciates the Court's concern about providing a record of the basis for the distributions in addition to the distribution amount. The Receiver believes **Exhibit A** resolves this issue.

whose Pre-Receivership Percentage Return set forth in Exhibit E was less than 20.05%

- Column H Total distributions by National Note and the Receiver as a result of adding Columns C, F and G
- Column I The revised percentage return of Net Principal Investment based on the Initial Distribution
- Column J The rising tide distribution of \$2,005,394.41 to be made in the second distribution to those holders of Allowed Claims whose percentage return of Net Principal Investment after the Initial Distribution as set forth in Column I is less than 27.57%
- Column K The revised percentage return of Net Principal Investment after the proposed second distribution

III.

MEMORANDUM OF LAW

22. A key objective of receiverships is to distribute recovered funds to defrauded investors as fairly and expeditiously as possible.⁶

23. It is well established that the Court has broad discretion in fashioning relief in equity receiverships,⁷ including authorizing distributions pursuant to a plan of distribution that is “fair and reasonable.”⁸

24. Here, after notice to all parties in interest in this case and opportunity to be heard, the Court entered the Initial Order which sets forth the Approved Methodology for making

⁶ *VesCor Capital Corp. v. Valle Verde L.P., et al.*, No. 2:07-CV-0363 (D. Utah) (Benson, J.) (Memorandum Decision and Order to Transfer Funds from Interpleader and to Release Funds for Use by the Receivership in Valle Verde, Jan. 29, 2009).

⁷ *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002); *SEC v. Hardy*, 803 F.2d 1034, 1037-39 (9th Cir. 1986).

⁸ *SEC v. Wealth Mgmt., LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010). *Accord, SEC v. 4NExchange, et al.*, No. 2:02-CV-0431 (D. Utah) (Kimball, J.) (Order Approving First Plan of Partial Distribution, Feb. 16, 2005).

distributions of the Receivership Estate in this case. In so doing, the Court determined that the Approved Methodology was fair and reasonable.⁹

25. The Receiver now has sufficient funds to make a second distribution and he is requesting authority to do so in accordance with the Approved Methodology.

26. The Receiver believes that this proposed second distribution, which is in accordance with the Approved Methodology in the Initial Order, is fair and reasonable and should be approved.

IV.

CONCLUSION

For the reasons stated herein, the Receiver requests that the Court enter an Order authorizing a second distribution in accordance with the Approved Methodology on a rising tide basis to the holders of Allowed Claims as listed in Column J of Exhibit A.

DATED this 14th day of June, 2018.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt

John J. Wiest

Attorneys for Receiver

⁹ See Initial Order.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S AMENDED MOTION SEEKING AUTHORIZATION TO MAKE SECOND DISTRIBUTION** was filed with the Court on this 14th day of June, 2018, and served via ECF on all parties who have requested notice in this case.

/s/ John J. Wiest _____