

Peggy Hunt (Utah State Bar No. 6060)
Chris Martinez (Utah State Bar No. 11152)
Tyson C. Horrocks (Utah State Bar No. 12557)

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
martinez.chris@dorsey.com
horrocks.tyson@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,

v.

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

Defendants.

**RECEIVER'S MOTION AND
MEMORANDUM IN SUPPORT
REQUESTING ORDER APPROVING
(1) PUBLIC SALE OF PROPERTY
FREE AND CLEAR OF INTERESTS,
(2) METHOD AND FORM OF
PUBLICATION NOTICE, AND (3)
PUBLIC AUCTION PROCEDURES**

(BANDANNA CABIN)

2:12-cv-00591 BSJ

The Honorable Bruce S. Jenkins

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 28 U.S.C. §§ 2001(a) and 2002 and 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 B**, approving (1) the public sale of certain real property described below pursuant to public sale free and clear of interests; (2) the Receiver's proposed method and form of publication notice for the public sale; and (3) approving the Receiver's proposed auction procedures governing such public sale set forth below. This Motion is supported by the Declaration of R. Wayne Klein, Receiver (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 (the "SEC") 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") (collectively 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

¹ Docket No. 9 (Receivership Order).

² See generally, *id.*

Defendants and the Palmer Entities . . . [.]”³

- “To take custody, control and possession of all Receivership Property and records . . . [.]”⁴
- “To use Receivership Property for the benefit of the Receivership Estates and hold in his possession, custody and control all Receivership Property, pending further Order of this Court[.]”⁵
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities”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
- “[L]ocate, list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates, either at public or private sale, on 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 real property.”⁸
- “[S]ell, and transfer clear title to, all real property in the Receivership Estates” upon order of the Court “pursuant to procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004.”⁹

³ *Id.* at ¶ 7(A).

⁴ *Id.* at ¶ 7(B).

⁵ *Id.* at ¶ 7(D).

⁶ *Id.* at ¶ 19.

⁷ *Id.* at ¶ 37.

⁸ *Id.* at ¶ 38.

⁹ *Id.* at ¶ 39.

II.

REAL PROPERTY TO BE SOLD AT AUCTION

The Property

3. Since his appointment, the Receiver has identified numerous real properties as being part of the Receivership Estate, and where appropriate has listed such properties for sale.¹⁰

4. Relevant to the present Motion is a 5.00 acre parcel of real property, including a 3,232 square foot home, located at 1552 Stagecoach Road, Fruitland, Utah (the “Real Property”).¹¹ The Real Property is more particularly described as:

Lot S-38, BANDANNA RANCH, STAGECOACH PHASE, according to the official plat thereof on file in the office of the Recorder, Duchesne County, Utah.¹²

5. Certain items of personal property are located at the Real Property, including two CAN AM ATVs, a pool table, a snow blower, and home furnishings (the “Personal Property”).¹³

Marketing of the Real Property

6. On or about August 21, 2012, the Receiver entered into a listing agreement with Providence Realty Group (the “Listing Agent”) to sell the Real Property, a copy of which is attached to the Receiver Declaration as Exhibit A.¹⁴

7. The Real Property was listed for sale on the multiple listing service and has been

¹⁰ Receiver Declaration ¶ 4.

¹¹ *Id.* ¶ 5.

¹² *See id.*, Exh. E (Title Report).

¹³ *Id.* ¶ 6.

¹⁴ *Id.* ¶ 7 & Exh. A.

actively marketed by the realtor.¹⁵

8. On February 20, 2013, the Receiver then filed a motion to appoint appraisers to value the Real Property, prior to those appraisers performing any appraisal.¹⁶ On or about February 25, 2013, the Court approved the appraiser motion and appointed Steve Nielsen of Nielsen and Company, Tony Duncan of Free and Associates, Inc., and J Allen Payne of Payne Appraisal Company, Inc. as appraisers of the Real Property.¹⁷

9. On March 15, 2013, Steve Nielsen of Nielsen and Company appraised the Real Property and the Personal Property, and issued an appraisal valuing the Real Property at \$260,000 and the Personal Property at \$40,000 (the “Appraisal”).¹⁸ A copy of the Appraisal is attached to the Receiver Declaration as Exhibit B.¹⁹

10. The Receiver only received one offer on the Real Property. The Receiver ultimately decided that the “Stalking Horse Bid” described below is the highest and best bid at this time, and that he would sell the Real Property and Personal Property a public sale.²⁰

The Purchase Agreement and Stalking Horse Bid at Auction

11. On or about April 17, 2013, Palmer contacted the Listing Agent to present an offer from a person he knows (the “Stalking Horse Bidder”) to purchase the Real Property and

¹⁵ *Id.* ¶ 8.

¹⁶ Docket No. 166.

¹⁷ Docket No. 169.

¹⁸ Receiver Declaration ¶ 9 & Exh. B, pp. 6 and 8.

¹⁹ When the Receiver filed the motion to appoint the appraisers, the Receiver was anticipating selling the Real Property through private sale. However, the Receiver ultimately decided to sell the Real Property through public sale. Because the Receiver proposes a public sale, appointment of three appraisers by the Court is not required. *See* 28 U.S.C. § 2001(a).

²⁰ Receiver Declaration ¶ 10.

Personal Property. The buyer offered to purchase the Real Property for \$260,000, with a \$1,000 escrow deposit, and the Personal Property for \$26,000.²¹

12. On or about April 19, 2013, the Receiver submitted a counter-offer to the holder of the Stalking Horse Bid, which clarified that the: (a) sale of the Personal Property would be separated from the sale of the Real Property; (b) the Receiver would provide a receiver's deed, not a warranty deed; and (c) the heating system in the home would not be warranted (the "Counteroffer").²²

13. On or about April 22, 2013, the holder of the Stalking Horse Bid accepted the Counteroffer and entered into the "Purchase Agreement" attached to the Receiver Declaration as Exhibit C.²³ The Purchase Agreement is conditioned upon the outcome of a public auction.²⁴

14. The Receiver also entered into a companion agreement to the Purchase Agreement, under which the Receiver will sell the Personal Property to the holder of the Stalking Horse Bid for \$26,000 in the event that its offer for the Real Property is the highest and best offer at auction and closes on the sale of the Real Property (the "Personal Property Purchase Agreement"), a copy of which is attached to the Receiver Declaration as Exhibit D.²⁵ The Receiver has entered into the Personal Property Purchase Agreement pursuant to the authority bestowed on him by this Court in the Receivership Order,²⁶ and is not seeking Court approval to

²¹ *Id.* ¶ 11 & Exh. C.

²² *Id.* ¶ 12 & Exh. C, Addendum # 2.

²³ *Id.* ¶ 13 & Exh. C.

²⁴ *Id.* ¶ 14 & Exh. C, Addendum # 2.

²⁵ *Id.* ¶ 15 & Exh. D.

²⁶ *See id.* at ¶ 37.

sell the Personal Property through this Motion.²⁷

15. The Purchase Agreement has been negotiated by the Receiver with the holder of the Stalking Horse Bid in good faith and at arms' length.²⁸

16. The Receiver proposes to use the offer made by the holder of the Stalking Horse Bid as the opening bid at the public auction described below (the "Stalking Horse Bid").²⁹

Sale Costs and Net Sale Proceeds

17. The Receiver anticipates paying the ordinary costs of the sale including market-rate closing costs and a market-rate 8.00% realtor commission to the Listing Agent, and delinquent property taxes at the time of closing of the sale of the Real Property.³⁰

18. Any interests against the Real Property, other than closing costs and property taxes, will not be paid at the time of closing of the sale. Rather, as proposed, any such interests (to the extent that they exist and without any waiver of the Receiver's rights and defenses related thereto) will survive the sale and will attach to the net sale proceeds, these being the sale proceeds, less the ordinary costs of sale (the "Net Sale Proceeds")³¹

19. The Receiver will separately account for the Net Sale Proceeds pending resolution of any disputes related to any claimed interest in the Real Property.³²

²⁷ *Id.* ¶ 16.

²⁸ *Id.* ¶ 17.

²⁹ *Id.* ¶ 18.

³⁰ *Id.* ¶ 19.

³¹ *Id.* ¶ 20.

³² *Id.* ¶ 21.

Free and Clear Sale

20. The Receiver proposes to sell the Real Property free and clear of all interests therein, with any interests that may exist attaching to the Net Sale Proceeds. In so doing, the Receiver is in no way waiving any rights, claims, interests or defenses to any claims or interests made against the Real Property or to the Net Sale Proceeds.³³

21. To determine interests, if any against the Real Property, the Receiver obtained a preliminary title report (the “Title Report”),³⁴ a copy of which is attached as Exhibit E to the Receiver Declaration.

22. According to the Title Report, the following exceptions to title exist: (a) property taxes for 2012; (b) a deed of trust dated October 1, 2011, executed by National Note as trustor to Express Title Insurance Agency, Inc., as trustee and MC Realty Advisers, LLC as beneficiary, to secure the payment of \$250,000.00, and interest, recorded November 1, 2011, as Entry No. 439618, in Book A-630, page 363, of the records of Duchesne County, Utah; and (c) various covenants and easements.³⁵

23. A copy of this Motion is being served on MC Realty Advisers, LLC.³⁶

Best Interests

24. The Receiver believes that the sale of Real Property as proposed is beneficial for and in the best interests of the Receivership Estate based on the appraised value of the Real Property and the amount of the Stalking Horse Bid, which was obtained through good faith and

³³ *Id.* ¶ 22.

³⁴ *Id.* ¶ 23 & Exh. E..

³⁵ *See id.* & Exh. E.

³⁶ *Id.* ¶ 24.

arms' length negotiations.³⁷

25. The Stalking Horse Bid is equal to the appraised value, and through the proposed auction, the purchase price cannot go lower and might increase.³⁸

26. Notice of the auction described below will be published and will be posted on the Receiver's website.³⁹

27. The SEC has been informed of the material terms of the sale, and has no objection thereto.⁴⁰

III.

APPLICABLE LAW

28. The Receivership Order, as set forth above anticipates the relief sought by the Receiver herein and is within the scope of his duties under that Order.⁴¹

29. Section 2001(a) of title 28 of the United States Code permits the Receiver to sell property of the receivership estate:

[A]t public sale in the district wherein such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs. Such sale shall be upon such terms and conditions as the Court directs.⁴²

30. Section 2002 of title 28 of the United States Code requires that notice of such

³⁷ *Id.* ¶ 25.

³⁸ *Id.* ¶ 26.

³⁹ *Id.* ¶ 27.

⁴⁰ *Id.* ¶ 28.

⁴¹ *See supra* ¶¶ 1-2.

⁴² 28 U.S.C. § 2001(a).

public sale be published, in relevant part, as follows:

[O]nce a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated.⁴³

IV.

REQUESTED RELIEF

31. The Receiver requests that the Court enter the proposed Order attached hereto, thus (a) authorizing the sale of the Real Property free and clear of interests; (b) approving the form and method of publication notice as proposed herein; and (c) approving the proposed “Auction Procedures” described below.

Sale Free and Clear of Interests

32. Sale of the Real Property as proposed is within the scope of the Receiver’s authority under the Receivership Order as quoted in paragraph 2 above and 28 U.S.C. §§ 2001(a) and 2002 both quoted in paragraphs 29 and 30 above, it is in the best interests of the Receivership Estate, and the sale serves the purposes of the receivership by providing a “realization of the true and proper value” of the Real Property.⁴⁴

33. The Court may order a sale of the Real Property free and clear of interests, provided that parties claiming interests against the property are given proper notice. Here, such notice will be provided, with any interests that may ultimately be determined to exist attaching to the Net Sale Proceeds.⁴⁵

⁴³ 28 U.S.C. § 2002.

⁴⁴ Receivership Order ¶ 38; Receiver Declaration ¶ 25.

⁴⁵ Receiver Declaration ¶ 24.

34. Upon completion of the sale and after the conclusion of the public auction discussed below, the Receiver will file with the Court a “Notice of Sale Results,” stating the purchase price that was obtained at public auction and reporting on the Net Sale Proceeds of the sale. This Notice of Sale Results will be served on those parties asserting interests in the Real Property noted in paragraph 22 above.⁴⁶

Proposed Publication Notice

35. To comply with the requirement of publication notice for public sales set forth in 28 U.S.C. § 2002, the Receiver seeks approval of the method and form of publication notice of the proposed public sale.

36. Accordingly, the Receiver proposes that the following notice be published in *The Salt Lake Tribune*, a newspaper published in Salt Lake City, Utah, and in the *Uintah Basin Standard*, a newspaper published in Roosevelt, Utah and distributed in Fruitland, Utah, once a week for a period of four weeks prior to the public sale (the “Publication Notice Time”):

R. Wayne Klein, Receiver for National Note of Utah, LC and its affiliated entities (the “Receiver”) in the civil case styled as *Securities and Exchange Comm. v. National Note of Utah, LC et al.*, Civ. Case No. 2:12-cv-00591 (D. Utah) (“Civil Case”), gives notice of his intent to sell a 5.00 acre parcel of real property which houses a 3,232 square foot home located at 1552 Stagecoach Road, Fruitland, Utah (the “Real Property”), more particularly described as Lot S-38, BANDANNA RANCH, STAGECOACH PHASE, according to the official plat thereof on file in the office of the Recorder, Duchesne County, Utah, through a public auction to the highest bidder payable in lawful money of the United States on the ___ day of _____, 2013 at the hour of ___ on the Real Property at the above stated address, or as may be continued from time to time by the Receiver (the “Auction”). The Real Property will be sold at the Auction free and clear of all interests, “as is” with no representations and warranties. The Receiver has accepted an initial bid of \$260,000.00 with a \$1,000 escrow deposit to act as the opening “Stalking Horse Bid” at Auction. Only “Qualified Bidders” may participate in the Auction. To be a Qualified Bidder, you must comply with the “Auction Procedures” that have been approved in the Civil Case, which Auction Procedures may be obtained on the Receiver’s

⁴⁶ Receiver Declaration ¶ 29.

website (<http://www.kleinutah.com/index.php/receiverships/national-note-of-utah-lc>) or upon request made to the Receiver's counsel at: Dorsey & Whitney LLP, attn: Michelle Montoya, 136 South Main Street, Suite 1000, Salt Lake City, Utah 84101; montoya.michelle@dorsey.com. The deadline for Qualified Bidders to submit bids, or the "Bid Deadline," is 5:00 p.m. (Mountain), _____, 2013.

37. The Receiver maintains that the above proposed method and form of publication notice is in accordance with 28 U.S.C. §§ 2001(a) and 2002 and, therefore, should be approved.

Proposed Auction Procedures

38. The Receiver requests that the Court enter an Order approving the following proposed procedures to govern the public sale (collectively, or as may be amended by the Court's Order, the "Auction Procedures"), a copy of which are attached hereto as **Exhibit A**:

- a. The Receiver may conduct an auction of a 5.00 acre parcel of real property which houses a 3,232 square foot home located at 1552 Stagecoach Road, Fruitland, Utah, more particularly described as Lot S-38, BANDANNA RANCH, STAGECOACH PHASE, according to the official plat thereof on file in the office of the Recorder, Duchesne County, Utah (the "Real Property") at the conclusion of the Publication Notice Time (the "Auction") in accordance with these Auction Procedures.
- b. The Receiver will facilitate reasonable requests for inspections of the Real Property by interested parties prior to the "Bid Deadline" (defined below).
- c. Pursuant to the Purchase Agreement attached as Exhibit C to the Receiver Declaration, the Receiver has received an offer to purchase the Real Property for \$260,000.00 which includes a \$1,000.00 escrow deposit, subject to higher and better bids at the Auction (the "SH Agreement"). The Receiver is treating the offer in the SH Agreement as the opening bid at Auction and is referred to herein as the "Stalking Horse Bid."
- d. To participate in the Auction, the potential purchaser must be a "Qualified Bidder."
- e. No person will be deemed to be a Qualified Bidder unless the person:
 - i. Delivers to the Receiver for the benefit of the Receivership Estate cash or a cashier's check in the amount of \$1,000.00 as an initial deposit (all such deposits being collectively, the "Initial Deposit"),

by no later than 5:00 p.m. Mountain Time at least two business days prior to the date set for the Auction (the "Bid Deadline");

- ii. Agrees in writing that its Initial Deposit is non-refundable pending the Sale Closing Date (defined below) and will be applied as set forth in these Auction Procedures;
 - iii. Agrees in writing to the approved Auction Procedures;
 - iv. Represents and warrants in writing that it has the ability to perform at Auction and on the Sale Closing Date (defined below);
 - v. Agrees in writing that the sale of the Real Property is "AS IS" with no representations and warranties; and
 - vi. Appears in person or through a qualified agent at the Auction and performs at Auction, as determined in the sole discretion of the Receiver, as provided in these Auction Procedures.
- f. If no Qualified Bidders exist on the expiration of the Bid Deadline, the Receiver, in his sole discretion, need not conduct the Auction and may sell the Real Property to the holder of the Stalking Horse Bid pursuant to the terms of the SH Agreement and such sale shall be deemed to be a sale of the Real Property at public auction under all applicable law.
- g. The Receiver will conduct the Auction. The Auction shall proceed in rounds. Bidding at the Auction shall begin with an initial minimum overbid of the Stalking Horse Bid in an amount of \$5,000.00 in cash, and shall subsequently continue in \$5,000.00 minimum cash overbid increments. However, the holder of the Stalking Horse Bid will be allowed to match any bid made by a Qualified Bidder without increasing such bid by the \$5,000 minimum cash overbid amount. Bidding will continue until the Receiver determines that he has received the highest and best offer for the Real Property, at which time he will close the Auction, with the person making the last bid prior to the Receiver's close of the Auction bound to purchase the Real Property pursuant to the terms of the approved Auction Procedures (the "Successful Bidder").
- h. Each Qualified Bidder and the holder of the Stalking Horse Bid agree that its last offer made is irrevocable until the date that sale of the Real Property closes to the Successful Bidder (the "Sale Closing Date").
- i. Each Initial Deposit shall be retained by the Receiver until Sale Closing Date. On the Sale Closing Date, the Initial Deposit of the Successful Bidder will be applied to the purchase price accepted at Auction by the Receiver. Within ten business

days of Sale Closing Date, the Receiver shall return all other Initial Deposits. In the event that the Successful Bidder's sale does not close, the Receiver (i) shall retain the Initial Deposit of the Successful Bidder as damages, and (ii) the Qualified Bidder who made the next highest and best offer at Auction (the "Back-Up Bid") shall be deemed the Successful Bidder. The Initial Deposit of the Qualified Bidder with the Back-Up Bid shall be applied by the Receiver to the purchase offer made at Auction. The Receiver may repeat the same Back-Up Bid procedure provided herein to each Qualified Bidder, in the order of the highest and best offers received at Auction.

- j. Immediately upon the close of the Auction, the Successful Bidder must (i) sign a purchase agreement on terms materially similar to the terms of sale stated in SH Agreement; and (ii) must deliver to the Receiver a non-refundable deposit of 10% of the purchase price accepted at Auction (the "10% Deposit"). In the event that the Sale Closing Date does not occur for the Successful Bidder, the Successful Bidder's Initial Deposit and this 10% Deposit will be retained by the Receiver as damages.

39. The Receiver submits that the proposed Auction Procedures are permitted under 28 U.S.C. §§ 2001(a) and 2002 and, therefore, requests that the Court approve the same.

CONCLUSION

Accordingly, for the reasons set forth herein, the Receiver requests that the Court enter the proposed Order attached hereto as **Exhibit B**, thus (a) authorizing the sale of the Real Property free and clear of interests; (b) approving the form and method of publication notice as proposed herein; and (c) approving the proposed Auction Procedures. The Receiver also requests any other relief appropriate under the circumstances.

DATED this 20th day of May, 2013.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt

Chris Martinez

Tyson C. Horrocks

Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MOTION AND MEMORANDUM IN SUPPORT REQUESTING ORDER APPROVING (1) PUBLIC SALE OF PROPERTY FREE AND CLEAR OF INTERESTS, (2) METHOD AND FORM OF PUBLICATION NOTICE, AND (3) PUBLIC AUCTION PROCEDURES (BANDANNA CABIN)** (the "Motion") was filed with the Court on this 20th day of May, 2013, and served via ECF on all parties who have requested notice in this case.

/s/ Candy Long

Furthermore, I certify that on the 20th day of May, 2013, the Motion was served on the following parties by U.S. Mail postage prepaid:

Wayne Palmer
8816 South 2240 West
West Jordan, Utah 84088
Defendant

MC Realty Advisers, LLC
c/o George W. Pratt
Jones Waldo, 170 S. Main Street, Suite 1500
Salt Lake City, UT 84101

Colene Nelson
Duchesne County Treasurer
PO Box 989
Duchesne, UT 84021

/s/ Candy Long