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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,

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**

(ELKHORN RIDGE LOT # 2)

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 its affiliated companies (the "Palmer Entities"), including Expressway Business Park, LLC (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 Defendants and the Palmer Entities . . . [.]"³

¹ Docket No. 9 (Receivership Order).

² *See generally, id.*

³ *Id.* at ¶ 7(A).

- “To take custody, control and possession of all Receivership Property and records . . . [.]”⁴
- “To use Receivership Property for the benefit of the Receivership Estates . . . [.]”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

II.

REAL PROPERTY TO BE SOLD AT AUCTION

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 2.5 acre parcel of real property within the

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.

¹⁰ Receiver Declaration ¶ 4.

“Elkhorn Ridge” subdivision, located in Oneida County, near Malad, Idaho, and more particularly described as:

Lot 2 of Elkhorn Ridge Estates Subdivision, Recorded in Oneida County, Idaho Recorders office on September 17, 2007 under instrument number 141595 (the “Property”).¹¹

5. Oneida County recently gave its final approval for the development of Elkhorn Ridge. Thus, lots in Elkhorn Ridge can now be sold without obtaining any special zoning variances.¹²

Value and Marketing of the Property

6. The Receiver obtained an appraisal of each of the thirty-three, 2.5 acre lots within Elkhorn Ridge on or about November 29, 2012 from Angela Bair, a certified residential appraiser in the State of Idaho (the “Appraisal”). A copy of the Appraisal is attached to the Receiver Declaration as Exhibit A for the Court’s review.¹³ The Appraisal values the Property at \$30,000.¹⁴

7. On October 10, 2012, the Receiver listed the Property for sale through the Idaho Real Estate Group. A copy of the listing agreement is attached to the Receiver Declaration as Exhibit B (the “Listing Agreement”). Under the Listing Agreement, the Receiver agrees to pay a commission equal to 10% of the purchase price upon closing of the sale.¹⁵ To determine an offering price for the Property, the Receiver relied upon the advice of his independent real estate

¹¹ See Receiver Declaration, Exh. D (Title Report) at p. 3.

¹² Receiver Declaration ¶ 6.

¹³ Receiver Declaration ¶ 7 & Exh. A (Appraisal). Because the Receiver proposes a public sale, appointment of three appraisers by the Court is not required. *See* 28 U.S.C. § 2001(a). But, the Receiver has provided the Court with a copy of the Appraisal that he obtained for the Court’s review.

¹⁴ Receiver Declaration, Exh. A (Appraisal) at p. 1.

¹⁵ Receiver Declaration, Exh. B (Listing Agreement) at p. 1.

professional and the Appraisal.¹⁶

8. The Receiver ultimately decided that the “Stalking Horse Bid” described below is the highest and best offer at this time and that he would sell the Property at a public sale.¹⁷

The Purchase Agreement and Stalking Horse Bid at Auction

9. On September 12, 2013, the Receiver received an offer to purchase the Property from Lima Flavio (“Flavio”) pursuant to the terms of the “Purchase Agreement” attached to the Receiver Declaration as Exhibit C.¹⁸ Pursuant to the Purchase Agreement, Flavio will purchase the Property for \$31,500.00, and Flavio has provided the Receiver with a \$1,000 escrow deposit, subject to higher and better offers.¹⁹

10. The Purchase Agreement has been negotiated by the Receiver with Flavio in good faith and at arm’s length.²⁰

11. The Receiver proposes using Flavio’s offer as a stalking horse bid (the “Stalking Horse Bid”) at the public auction described below.²¹

Sale Costs and Net Sale Proceeds

12. The Receiver anticipates paying only a 10% commission and the ordinary costs of the sale including market-rate closing costs and delinquent property taxes, if any, at the time of closing of the sale of the Property.²²

¹⁶ Receiver Declaration ¶ 8.

¹⁷ Receiver Declaration ¶ 9.

¹⁸ Receiver Declaration ¶ 10, Exh. C (Purchase Agreement).

¹⁹ Receiver Declaration ¶ 11 & Exh. C (Purchase Agreement).

²⁰ Receiver Declaration ¶ 12.

²¹ Receiver Declaration ¶ 13.

²² Receiver Declaration ¶ 14.

13. Any interests against the Property, other than closing costs, the commission, 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 costs of sale (the "Net Sale Proceeds").²³

14. The Receiver will separately account for the Net Sale Proceeds pending resolution of any disputes related to interests that may exist against the Property.²⁴

Free and Clear Sale

15. The Receiver proposes to sell the 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 Property or to the Net Sale Proceeds.²⁵

16. To determine interests, if any against the Property, the Receiver obtained a preliminary title report (the "Title Report"),²⁶ a copy of which is attached as Exhibit D to the Receiver Declaration.

17. According to the Title Report, the following exceptions to title exist: (a) property taxes for the year 2013, which are not yet due; (b) various easements; and (c) one insider Deed of Trust in the amount of \$48,750.00 dated January 4, 2008, executed by Elkhorn Ridge, LLC as trustor in favor of NNU as beneficiary.²⁷

²³ Receiver Declaration ¶ 15.

²⁴ Receiver Declaration ¶ 16.

²⁵ Receiver Declaration ¶ 17.

²⁶ Receiver Declaration ¶ 18 & Exh. D (Title Report).

²⁷ Receiver Declaration, Exh. D (Title Report).

18. The Receiver has also identified one person holding an Assignment of Beneficial Interest in the Property (the “ABI Holder”). To facilitate the proposed sale of the Property, the Receiver proposes allowing any interests in the Property, including the identified and remaining interest asserted by the ABI Holder, to attach to the Net Sale Proceeds while he evaluates the validity of such interests. In so doing, the Receiver is in no way waiving any rights, claims, interests or defenses to any claims or interests made against the Property or to the Net Sale Proceeds.²⁸

19. As set forth in the Certificate of Service attached hereto, a copy of the Motion is being served on the relevant taxing authorities and the ABI Holder. A copy of the Receiver Declaration and attached exhibits will be posted on the Receiver’s website and will be available upon request.²⁹

Best Interests

20. The Receiver believes that the sale of Property as proposed is beneficial for and in the best interests of the Receivership Estate based on the appraised value of the Property and the amount of the Stalking Horse Bid, which was obtained through good faith and arms’ length negotiations.³⁰

21. The Stalking Horse Bid is equal to 105% of the appraised value,³¹ and through the

²⁸ Receiver Declaration ¶ 19.

²⁹ Receiver Declaration ¶ 20.

³⁰ Receiver Declaration ¶ 21.

³¹ Although the only Appraisal of the Property yielded a value of \$30,000, in the interest of full disclosure to the Court, the Receiver notes that: (a) the Property was originally listed at a price of \$35,000; (b) two lots within Elkhorn Ridge, which are materially identical to the Property have been recently appraised at \$35,000 and \$37,000 respectively; and (c) one materially identical lot within Elkhorn Ridge recently sold for \$35,000. Receiver Declaration ¶ 22.

proposed auction, the purchase price cannot go lower and might increase.³²

22. Notice of the auction described below will be published and will be posted on the Receiver's website.³³

23. The SEC has been informed of the material terms of the sale, and has no objection thereto.³⁴

APPLICABLE LAW

24. 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.³⁵

25. 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.³⁶

26. Section 2002 of title 28 of the United States Code requires that notice of such public sale be published:

[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.³⁷

REQUESTED RELIEF

27. The Receiver requests that the Court enter the proposed Order attached hereto,

³² Receiver Declaration ¶ 23.

³³ Receiver Declaration ¶ 24.

³⁴ Receiver Declaration ¶ 25.

³⁵ *See supra* ¶¶ 1-2.

³⁶ 28 U.S.C. § 2001(a).

³⁷ 28 U.S.C. § 2002.

thus (a) authorizing the sale of the 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

28. Sale of the Property as proposed is within the scope of the Receiver’s authority under the Receivership Order as quoted in ¶ 2 above and 28 U.S.C. §§ 2001(a) and 2002 both quoted in ¶¶ 25 and 26 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 Property.³⁸

29. The Court may order a sale of the 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.³⁹

30. 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 Property noted in paragraphs 17 and 18 above.⁴⁰

Publication Notice

31. To comply with the requirement of publication notice set forth in 28 U.S.C. § 2002, the Receiver seeks approval of the method and form of publication notice of the

³⁸ Receivership Order ¶ 38; Receiver Declaration ¶ 21.

³⁹ Receiver Declaration ¶ 16.

⁴⁰ Receiver Declaration ¶ 26.

proposed sale of the Property described above.

32. Accordingly, the Receiver proposes that the following notice be published in *The Idaho Enterprise*, a newspaper published in Oneida County, Idaho, 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 certain real property known as Lot 2 of Elkhorn Ridge Estates Subdivision, Recorded in Oneida County, Idaho Recorders office on September 17, 2007 under instrument number 141595 (the "Property"), 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 Property at the above stated address, or as may be continued from time to time by the Receiver (the "Auction"). The 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 \$31,500.00 with a \$1,000.00 down payment 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 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.

Auction Procedures

33. 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 certain real property known as Lot 2 of Elkhorn Ridge Estates Subdivision, Recorded in Oneida County, Idaho Recorders office on September 17, 2007 under instrument number 141595 (the "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 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 Property for \$31,500.00 which includes a \$1,000.00 down payment, 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 and the deposit posted in conjunction with the Stalking Horse Bid, being collectively, the "Initial Deposit"), along with a written representation that the Qualified Bidder's offer will be in cash, 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 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 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 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 \$1,000.00 in cash, and shall subsequently continue in \$1,000.00 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 \$1,000.00 minimum cash overbid amount. Bidding will continue until the Receiver determines that he has received the highest and best offer for the 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 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 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 an additional 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.

34. 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 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 21st day of October, 2013.

DORSEY & WHITNEY LLP

 /s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Jeffrey M. Armington

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 (ELKHORN RIDGE LOT 2)** (the "Motion") was filed with the Court on this 21st day of October, 2013 and served via ECF on all parties who have requested notice in this case.

/s/ Jeffrey M. Armington

Furthermore, I certify that on the 21st day of October, 2013, the Motion was served on the following parties by U.S. Mail postage prepaid:

Dianne B. Pett
Oneida County Tax Collector
10 Court Street
Malad, Idaho 83252

Oneida County Tax Collector

American Pension Services, Inc. / FUB
Sheralyn Holgate
4168 West 12600 South, Ste 300
Riverton, UT 84096

ABI Holder

/s/ Jeffrey M. Armington