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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**

**(BYRON WEST INDUSTRIAL PARK
LOT 2 BLOCK 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 A**, 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"), including DPLM 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:

¹ Docket No. 9 (Receivership Order).

² *See generally, id.*

- “[D]etermine the nature, location and value of all property interests of the Receivership 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 AND STALKING HORSE BID

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 real property located at 1420 Voll Dr. NW Byron, Minnesota 55920 (the “Property”). The Property is part of a 14-lot industrial park in Byron, Minnesota (the “Byron West Industrial Park”).¹¹

Value and Marketing of the Property

5. The Receiver obtained two appraisals of the Byron West Industrial Park. The first was performed by Charles P. Blekre (“Blekre”) of Blekre Appraisal Services, LLC on or about June 4, 2014 (the “Blekre Appraisal”). The second was performed by Lance Thorkelson (“Thorkelson”) of Thorkelson Services, Inc. on or about August 15, 2014 (the “Thorkelson Appraisal”). Portions of the Blekre Appraisal and the Thorkelson Appraisal relevant to the Property are attached to the Receiver Declaration as Exhibits A and B, respectively.¹²

6. Blekre valued the Property at \$469,000.00 and Thorkelson valued the Property at

¹⁰ Receiver Declaration ¶ 4.

¹¹ *Id.* at ¶ 5. The Property is technically two parcels—PIN Nos. 75.31.23.068516 and 75.31.23.068522, but have been combined for the purposes of valuation and sale. *Id.* at Exh. A (Blekre Appraisal).

¹² *Id.* at ¶ 6 and Exhs. A (Blekre Appraisal) & B (Thorkelson Appraisal).

\$39,250.00.¹³ The 2012 assessed value of the Property is \$168,300.00.¹⁴

7. On or about October 6, 2014, the Receiver caused the Property to be listed for sale through Braasch Commercial Real Estate (the “Listing Agent”) for \$281,500.00.¹⁵ A copy of the Listing Agreement is attached to the Receiver Declaration as Exhibit C.

8. The Property has been marketed through the Listing Agent and the Receiver and listed on the multiple listing service.¹⁶

The Proposed Purchase Agreement and Stalking Horse Bid at Auction

9. The Receiver has received an offer to purchase the Property pursuant to the terms of the “Purchase Agreement” attached to the Receiver Declaration as Exhibit D, which is a bid in the amount of \$210,000.00 with a \$5,000.00 deposit, subject to higher and better offers.¹⁷

10. To facilitate the purchase and as a condition of the Purchase Agreement, Byron City has agreed to waive approximately \$15,000.00 in accrued assessments for the Property.¹⁸

11. The Purchase Agreement has been negotiated by the Receiver with the

¹³ *Id.* at Exhs. A (Blekre Appraisal) & B (Thorkelson Appraisal). The Blekre Appraisal assumed a ten-year time horizon for marketing the Property and the Thorkelson Appraisal assumed a six to nine-month time horizon.

¹⁴ *Id.* at Exh. A (Blekre Appraisal).

¹⁵ *Id.* at ¶ 7 & Exh. C (Listing Agreement).

¹⁶ *Id.* at ¶ 8.

¹⁷ Receiver Declaration ¶ 9 & Exh. D (Purchase Agreement).

¹⁸ *Id.* at ¶ 10 & Exh. E (Waiver). The final waiver amount by Byron City might be higher if necessary to account for property taxes that became due in November 2014 and interest that has continued to accrue. Byron City has indicated to the Receiver its willingness to grant waivers sufficient to allow the sale to proceed in a manner that will provide approximately \$10,000.00 in net sales proceeds to the Receivership Estate.

prospective purchaser and Byron City in good faith and at arms' length.¹⁹

12. The Receiver proposes to use this offer as a stalking horse bid at the public auction described below (the "Stalking Horse Bid").²⁰

Sale Costs and Net Sale Proceeds

13. The Receiver anticipates paying the ordinary costs of the sale, including market-rate closing costs and a standard 6% realtor commission at the time of closing of the sale of the Property. The realtor commission will be paid even if a higher and better offer is obtained at auction, inasmuch as the realtor brought the Stalking Horse Bid to the Receiver; however, the commission will be capped at the amount of the Stalking Horse Bid.²¹

14. Five of the 14 lots in the Byron West Industrial Park, including the Property, are subject to a bond in the amount of \$571,046.73 (the "Bond"). The bond assessments and property taxes tied to this Property are approximately \$200,897.35. Other than the bond assessments and property taxes, the Receiver does not know of any interests against the Property. To the extent they are asserted, however, any such interests (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") and will be separately accounted for by the Receiver.²²

15. The City of Byron has agreed to waive approximately \$15,000.00 in assessments

¹⁹ *Id.* at ¶ 11.

²⁰ *Id.* at ¶ 12.

²¹ *Id.* at ¶ 13 & Exh. C (Listing Agreement).

²² *Id.* at ¶ 14.

on the Property to facilitate the sale.²³

Free and Clear Sale

16. The Receiver proposes to sell the Property free and clear of all interests therein, other than property taxes and bond assessments which will be paid at closing, with any other 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.²⁴

17. To determine interests, if any against the Property, the Receiver obtained a preliminary title report (the “Title Report”),²⁵ a copy of which is attached as Exhibit F to the Receiver Declaration.

18. According to the Title Report, current 2014 property taxes, including penalties and interest are now due. Additionally, past-due taxes, including penalties and interest for the years 2009-2013 are due. The Bond does not appear on the Title Report because Byron City has not yet responded to a request for a special assessment certificate on the Property.²⁶

19. A copy of the Motion and the Receiver Declaration are being served on the relevant taxing authorities and the City of Byron.²⁷

²³ *Id.* at ¶ 10 & Exh. E (Waiver).

²⁴ *Id.* at ¶ 15.

²⁵ *Id.* at ¶ 16 & Exh. F (Title Report).

²⁶ *Id.* at ¶ 17 & Exh. F (Title Report).

²⁷ *Id.* at ¶ 18.

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 values of the Property and the amount of the Stalking Horse Bid, which was obtained through good faith and arms' length negotiations.²⁸

21. The Stalking Horse Bid is significantly greater than the Thorkelson appraised value and greater than the assessed value of the Property. Through the proposed auction, the purchase price cannot go lower and might increase.²⁹

22. Notice of the auction described below will be served on all persons who submitted offers to purchase the Property during the Receiver's initial marketing of the Property, will be included in publication in newspapers in Salt Lake City, Utah and Byron, Minnesota, and will be posted on the Receiver's website.³⁰

III.

APPLICABLE LAW

23. 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.³¹

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

²⁸ *Id.* at ¶ 19.

²⁹ *Id.* at ¶ 20.

³⁰ *Id.* at ¶ 21.

³¹ *See supra* ¶¶ 1-2.

[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.³²

25. Section 2002 of title 28 of the United States Code requires that notice of such public sale be published, in relevant part, as follows:

once 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.³³

IV.

REQUESTED RELIEF

26. The Receiver requests that the Court enter the proposed Order attached as **Exhibit A**, 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 attached as **Exhibit B**; and (c) approving the proposed “**Auction Procedures**” described below.

Sale Free and Clear of Interests

27. 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 ¶¶ 24 and 25 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.³⁴

³² 28 U.S.C. § 2001(a).

³³ 28 U.S.C. § 2002.

³⁴ Receivership Order ¶ 38; Receiver Declaration ¶ 19.

28. 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.³⁵

29. Byron City has agreed to waive approximately \$15,000.00 of property taxes and bond assessments to facilitate the sale. The Receiver requests that the Court's approval of the sale be conditioned on this waiver by Byron City.

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 ¶ 19 above.³⁶

Proposed Publication Notice

31. 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.

32. 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 *Byron Review* a newspaper published in Byron, Minnesota, once a week for a period of four weeks prior to the public sale (the "Publication Notice Time"):

³⁵ Receiver Declaration ¶¶ 14 & 18.

³⁶ Receiver Declaration ¶ 22.

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 located at 1420 Voll Dr. NW Byron, MN, 55920, with the following legal description: Sect-31 Twp-107 Range-015 Byron West Industrial Park Lot-002 Block-002 LOT 2 BLK 2 Less S100ft, PIN 75.31.23.068516 & Sect-31 Twp-107 Range-015 Byron West Industrial Park Lot-002 Block-002 S100ft LOT 2 BLK 2, PIN 75.31.23.068522 (the “Property”) through a public auction to the highest bidder payable in lawful money of the United States on the ___ day of _____, 2014 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 \$210,000.00 together with a \$5,000.00 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 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.

33. 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

34. 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 B**:

- a. The Receiver may conduct an auction of certain real property located at 1420 Voll Dr. NW Byron, MN, 55920 with the following legal description: Sect-31 Twp-107 Range-015 Byron West Industrial Park Lot-002 Block-002 LOT 2 BLK 2 Less S100ft, PIN 75.31.23.068516 & Sect-31 Twp-107 Range-015 Byron West Industrial Park Lot-002 Block-002 S100ft LOT 2 BLK 2, PIN 75.31.23.068522 (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 D to the Receiver Declaration, the Receiver has received an offer to purchase the Property for \$210,000.00 which includes a \$5,000.00 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 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 \$5,000.00 as an initial deposit (all such deposits and the deposit posted in conjunction with the Stalking Horse Bid, being collectively, the “Initial Deposit”), by no later than 5:00 p.m. Mountain Time at least five 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 \$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 \$5,000.00 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.
35. 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 A**, 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 18th day of November, 2014.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt

Chris Martinez

Sarah Goldberg

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 (BYRON WEST INDUSTRIAL PARK LOT 2 BLOCK 2)** was filed with the Court on this 18th day of November, 2014, and served via ECF on all parties who have requested notice in this case and was served via U.S. Mail, postage prepaid, on this 18th day of November, 2014, on the following:

Wayne Palmer
8816 South 2240 West
West Jordan, UT 84088

Olmsted County Property Records
151 4th St. SE
Rochester, MN 55904

Mary Blair-Hoefl
City Administrator
P.O. Box 1137
680 Byron Main Court N.E.
Byron, MN 55920

/s/ Sarah Goldberg