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**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 AMENDED 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, (3) PUBLIC  
AUCTION PROCEDURES, AND (4)  
SETTLEMENT AGREEMENT WITH  
CO-OWNER**

**(2351 GRANT AVE., OGDEN, UT)**

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 of record, hereby files this amended motion (the "Amended Motion"), and respectfully requests that the Court authorize him to sell at public auction certain real property of

the Receivership Estate, described more fully and defined in the Amended Memorandum in Support as the “Property,” and approve the settlement agreement (the “Settlement Agreement”) between the Receivership Estate and Katy Athay, co-owner of the Property (“Athay”).<sup>1</sup>

This Amended Motion is supported by the Amended Declaration of Receiver R. Wayne Klein (the “Amended Receiver Declaration”), which has been filed concurrently herewith. A proposed Order is submitted herewith and attached hereto as **Exhibit A**.

## **MEMORANDUM IN SUPPORT**

### **I.**

#### **FACTUAL 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 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”).<sup>2</sup> Pursuant to the Receivership Order, the Receiver was appointed, and NNU, 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.<sup>3</sup>

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<sup>1</sup> On November 17, 2015, the Court held a hearing on *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 (2351 Grant Ave., Ogden, UT)*, Docket No. 1029. This Amended Motion is filed to address certain concerns of the Court raised at the hearing.

<sup>2</sup> Docket No. 9 (Receivership Order).

<sup>3</sup> *See generally, id.*

2. One of the Palmer Entities is Presidential Utah Properties LC (“PUP”).<sup>4</sup>
3. 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 . . . [.]”<sup>5</sup>
- “To take custody, control and possession of all Receivership Property and records . . . [.]”<sup>6</sup>
- “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[.]”<sup>7</sup>
- “[T]o take immediate possession of all real property of the Receivership Defendants and the Palmer Entities . . . .”<sup>8</sup>
- “[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.”<sup>9</sup>
- “[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,

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<sup>4</sup> Amended Receiver Declaration ¶ 4.

<sup>5</sup> Receivership Order ¶ 7(A).

<sup>6</sup> *Id.* at ¶ 7(B).

<sup>7</sup> *Id.* at ¶ 7(D).

<sup>8</sup> *Id.* at ¶ 19.

<sup>9</sup> *Id.* at ¶ 37.

and with due regard to the realization of the true and proper value of such real property.”<sup>10</sup>

- “[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.”<sup>11</sup>

## II.

### **REAL PROPERTY TO BE SOLD AT AUCTION AND STALKING HORSE BID**

#### **2351 Grant Ave., Ogden, UT**

4. Since his appointment, the Receiver has identified numerous real properties as being part of the Receivership Estate, and where appropriate has listed such property for sale.<sup>12</sup>

5. This Motion concerns real property located at 2351 Grant Ave., Ogden, UT 84401 (“the Property”), consisting of three parcels with the following parcel tax ID numbers:

- Parcel # 01-029-0030
- Parcel # 01-029-0035
- Parcel # 01-029-0034.

6. The Receiver obtained a Commitment for Title Insurance for the Property, a copy of which is attached to the Amended Receiver Declaration as **Exhibit A** (the “Insurance Commitment”). The Insurance Commitment lists two addresses for the Property, 2347 and 2351 Grant Ave., Ogden, UT 84401.<sup>13</sup> For purposes of the Amended Motion, the Property will be

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<sup>10</sup> *Id.* at ¶ 38.

<sup>11</sup> *Id.* at ¶ 39.

<sup>12</sup> Amended Receiver Declaration ¶ 5.

<sup>13</sup> *Id.* at Exh. A (Insurance Commitment at 1).

identified as 2351 Grant Ave., Ogden, UT.

7. According to the Insurance Commitment, the Palmer Entity PUP has an undivided 49.2% interest and Athay has an undivided 50.8% interest in the Property.<sup>14</sup>

8. Since his appointment, the Receiver has maintained the Property for the benefit of the Receivership Estate. Athay has not contributed any money toward the maintenance of the Property since the Receiver's appointment. The total post-receivership property maintenance expenses were in the amount of \$86,458.99 and the post-receivership revenue from the Property was in the amount of \$31,750.00, leaving net costs of \$54,708.99 (the "Property Costs").<sup>15</sup>

9. Furthermore, upon review of the books and records of the Receivership Estate, it does not appear that Athay contributed any funds toward the maintenance of the Property prior to the Receiver's appointment (these being defined in the Settlement Agreement as the "Pre-Action Expenses").<sup>16</sup>

10. Since his appointment, the Receiver has communicated with Athay about the Property and his need to liquidate the Receivership Estate's interest in the Property. Athay initially resisted any change in circumstances, but in approximately May 2014 the Receiver and Athay entered into an *Agreement to List the Grant Street, Ogden [Property] for Sale*, a copy of which is attached to the Amended Receiver Declaration as **Exhibit G** (the "Owner Agreement"). Pursuant to the Owner Agreement, the Receiver agreed to hold off marketing the Property for

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<sup>14</sup> *Id.* at Exh. A (Insurance Commitment at 1).

<sup>15</sup> *Id.* at ¶ 8. In the Settlement Agreement, the Property Costs are referred as the "Post-Action Expenses." *Id.* at Exh. F (Settlement Agreement at pg. 2).

<sup>16</sup> *Id.* at ¶ 8, Exh. F (Settlement Agreement at pg. 2).

sale while Athay attempted to obtain financing and development plans for the Property. It was agreed that if Athay was not successful by July 15, 2014, the Receiver could list the Property for sale.<sup>17</sup>

### **Appraising and Marketing the Property**

11. Athay was not able to obtain financing or a development plan for the Property by July 2014. Accordingly, in approximately August 2014, the Receiver prepared to list the Property for sale with Athay's consent.<sup>18</sup>

12. To determine an offering price for the Property and to comply with his duties, the Receiver obtained the opinion an appraiser as to the value of the Property.<sup>19</sup>

13. On September 2, 2014, the Receiver received an appraisal for the Property ("Appraisal") from Stan C. Craft of Free and Associates, Inc.<sup>20</sup> A true and correct copy of the portions of the Appraisal that are relevant to the Property is attached to the Amended Receiver Declaration as **Exhibit B**.

14. Free and Associates, Inc. appraised the "as is" market value of a fee simple interest in the Property at \$720,000 as of January 1, 2014 and \$760,000 as of August 15, 2014.<sup>21</sup>

15. On or about December 11, 2014, the Receiver, with Athay's consent, caused the Property to be listed for sale through a "Listing Agreement" with Equity Real Estate (the

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<sup>17</sup> *Id.* at Exh. G (Owner Agreement).

<sup>18</sup> *Id.* at ¶ 10.

<sup>19</sup> *Id.* at ¶ 11.

<sup>20</sup> *Id.* at ¶ 12.

<sup>21</sup> *Id.* at Exh. B (Appraisal).

“Realtor”). A copy of the current extension of the Listing Agreement with addenda is attached as **Exhibit C** to the Amended Receiver Declaration.<sup>22</sup>

16. The Receiver marketed the Property for sale through the Realtor, including by listing the property on the Multiple Listing Service.<sup>23</sup>

**The Proposed Purchase Agreement, Stalking Horse Bid, and the Settlement Agreement**

17. The Receiver has received an offer to purchase the Property pursuant to the terms of the “Purchase Agreement,” which is bid in the amount of \$600,000.00, with a \$20,000.00 deposit, subject to higher and better offers.<sup>24</sup> A copy of the Purchase Agreement is attached to the Amended Receiver Declaration as **Exhibit D**.

18. The Purchase Agreement was negotiated by the Receiver and the prospective purchaser in good faith and at arms’ length.<sup>25</sup>

19. The Receiver proposes to use this offer as a stalking horse bid at the public auction described below (the “Stalking Horse Bid”).<sup>26</sup>

20. In the event that a higher and better offer is accepted by the Receiver, the Receiver has agreed to pay the holder of the Stalking Horse Bid its costs to conduct an appraisal of the Property.<sup>27</sup>

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<sup>22</sup> *Id.* at ¶ 13.

<sup>23</sup> *Id.* at ¶ 14, Exh. C. (Listing Agreement).

<sup>24</sup> *Id.* at ¶ 15, Exh. D (Purchase Agreement Addendum ¶ 3).

<sup>25</sup> *Id.* at ¶ 16.

<sup>26</sup> *Id.* at ¶ 17.

<sup>27</sup> *Id.* at Exh. D (Purchase Agreement Addendum ¶ 4).

21. The Receiver understands that after he obtained the Stalking Horse Bid, Athay obtained financing to seek to purchase the Receivership Estate's interest in the Property. Athay has informed the Receiver that she wants him to conduct an auction of the Property and allow her to credit bid her 50.8% interest in the Property. If she is not the highest and best offeror at auction, Athay has determined that she will transfer her 50.8% interest in the Property to the highest and best offeror.<sup>28</sup>

22. To facilitate the sale of the Property and Athay's requests, on or about November 16, 2015, the parties entered into the Settlement Agreement, attached to the Amended Receiver Declaration as Exhibit F, related to the Property sale and the parties' mutual claims against each other.<sup>29</sup>

23. The Settlement Agreement allows Athay to credit bid her 50.8% ownership interest in the Property at the auction, provided she (a) agrees in writing to the approved Auction Procedures before the Bid Deadline as set forth in paragraph 53(e) of this motion, and (b) gives the Receiver a third party commitment of funds in writing by no later than December 1, 2015. The amount of the credit bid is calculated as follows:

- a. 50.8% of the highest bid amount at the auction after deduction of closing costs, taxes, Post-Action Expenses, and sales commission, plus
- b. \$18,288.00, which is 50.8% of the real estate commissions due at closing.<sup>30</sup>

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<sup>28</sup> *Id.* at Exh. F (Settlement Agreement at ¶ 2).

<sup>29</sup> *Id.* at ¶ 18.

<sup>30</sup> *Id.* at Exh. F (Settlement Agreement at ¶ 3).



24. The additional \$18,288.00 of the credit bid is in consideration of Athay entering into the Settlement Agreement, and to relieve her of having to pay the real estate commission relating to the purchase of that portion of the property which she already owns. If Athay is not the high bidder, this portion of the credit bid will become moot. The Receiver acknowledges that this provides Athay with a premium in the bidding process, and he has proposed disclosure of this fact through the publication notice as outlined below.<sup>31</sup>

25. The Settlement Agreement releases the Receivership Estate from any claims Athay may have against it related to the Property and investments that Athay made with National Note, and resolves any past dispute about the Property Costs. In addition, the Receivership Estate is releasing Athay for claims that it may have against her related to the Pre-Action Expenses and funds that she received from National Note pursuant to a lease-back agreement.<sup>32</sup>

26. The Settlement Agreement was negotiated with Athay in good faith and arms' length. The Receiver believes the Settlement Agreement is in the best interest of the Receivership Estate.<sup>33</sup>

#### **Sale Costs and Net Sale Proceeds**

27. The Receiver and Athay anticipate paying at the time of closing of the sale outstanding property taxes and the ordinary costs of sale, including market-rate closing costs and a standard 6.00% realtor commission. In addition, in accordance with the Settlement Agreement discussed above, Athay has agreed that the Property Costs will be paid out of the gross sale

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<sup>31</sup> *Id.* at Exh. F (Settlement Agreement at ¶ 4).

<sup>32</sup> *Id.* at Exh. F (Settlement Agreement at ¶ 5(c), ¶ 6).

<sup>33</sup> *Id.* at ¶ 32.

proceeds prior to distribution to the parties.<sup>34</sup> The gross sale proceeds, less the costs of sale, taxes, commission, and the Property Costs are referred to herein as the “Net Sale Proceeds.”

28. 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 based on the amount of the Stalking Horse Bid. Pursuant to the Settlement Agreement, the commission will be paid from the gross sale proceeds, but Athay will be given credit for 50.8% of the commission in her credit bid (if she is the successful bidder), essentially amounting to a premium on the value of her credit bid.<sup>35</sup>

29. Any other interests (to the extent that they exist and without any waiver of the Receiver or the Receivership Estate’s rights and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds.<sup>36</sup>

30. The Receiver will separately account to the Court for the Net Sale Proceeds pending resolution of any disputes related to interests that may exist against the Property.<sup>37</sup>

#### **Free and Clear Sale**

31. The Receiver and Athay propose to sell the Property free and clear of all interests therein, with any interests that may exist attaching to the Net Sale Proceeds, except for property taxes and closing costs which will be paid at closing. In so doing, the sellers are not in any way waiving any rights, claims, interests or defenses to any claims or interests made against the

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<sup>34</sup> *Id.* at ¶ 19, Exh. F (Settlement Agreement at ¶ 5(c)).

<sup>35</sup> *Id.* at ¶ 20.

<sup>36</sup> *Id.* at ¶ 21.

<sup>37</sup> *Id.* at ¶ 22.

Property or to the Net Sale Proceeds.<sup>38</sup>

32. To determine interests, if any, against the Property, the Receiver obtained the Insurance Commitment. The Insurance Commitment shows no other interests in the Property, other than Athay's 50.8% ownership interest.<sup>39</sup>

33. The Receiver also obtained a Weber County 2015 Notice of Property Valuation and Tax Change and addenda ("Tax Notice") to determine tax liabilities on the Property.<sup>40</sup> The Tax Notice is attached to the Amended Receiver Declaration as **Exhibit E**.

34. From the Tax Notice, the Receiver has determined that property taxes on the Property for the years 2008 through 2014 are due and payable. There may also be taxes that have accrued during the 2015 tax year that will need to be paid from the Net Sale Proceeds.<sup>41</sup>

35. Any other financial interests against the Property, other than property taxes and closing costs, will not be paid at the time of closing of the sale. Rather, any such interests (to the extent they exist and without any waiver of the Receiver or the Receivership Estate's right and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds, defined as the gross sale proceeds minus the costs paid at closing described above. While the Receiver does not anticipate any other interests being asserted, in the event that they are, he anticipates that

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<sup>38</sup> *Id.* at ¶ 23.

<sup>39</sup> *Id.* at Exh A (Insurance Commitment). The Insurance Commitment identifies a number of assignments of beneficial interest ("ABIs") in the Property that National Note had granted to investors. The Receiver has now obtained a release of all those ABIs.

<sup>40</sup> *Id.* at ¶ 24.

<sup>41</sup> *Id.* at ¶ 25 and Exh. E (Tax Notice).

Athay will pay 50.8% of such interests.<sup>42</sup>

36. A copy of this Motion is being served on the relevant taxing authority and Athay.<sup>43</sup>

**Best Interests**

37. 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.<sup>44</sup>

38. The Stalking Horse Bid is 78.9% of the appraised value of the Property. Through the proposed auction, the purchase price cannot go lower and might increase.<sup>45</sup>

39. Notice of the auction described below will be served on all persons who submitted offers to purchase the Property during the initial marketing of the Property, will be included in publication in newspapers in Salt Lake City, Utah, and Ogden, Utah, and will be posted on the Receiver's website.<sup>46</sup>

40. 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

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<sup>42</sup> *Id.* at ¶ 21.

<sup>43</sup> *Id.* at ¶ 23.

<sup>44</sup> *Id.* at ¶ 27.

<sup>45</sup> *Id.* at ¶ 28.

<sup>46</sup> *Id.* at ¶ 29.

sale. This Notice of Sale Results will be served on those parties asserting interests in the Property, if any other than Athay.<sup>47</sup>

### III.

#### APPLICABLE LAW

41. 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.<sup>48</sup>

42. 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.<sup>49</sup>

43. 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.<sup>50</sup>

44. The Receiver may also enter into settlement agreements. 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.” *Sec. & Exch. Comm’n v. Credit*

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<sup>47</sup> *Id.* at ¶ 30.

<sup>48</sup> *See supra* ¶¶ 1, 3.

<sup>49</sup> 28 U.S.C. § 2001(a).

<sup>50</sup> 28 U.S.C. §2002.

*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)).

45. Public policy strongly favors settlement agreements. *See, e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215, 114 S.Ct 1461, 1468, 128 L. Ed. 2d 148 (1994) (“...public policy wisely encourages settlements...”); *In re Artha Management, Inc.*, 91 F.3d 326, 329 (2d Cir. 1996) (court declines to set aside settlement agreement as a fraudulent transfer, noting “...public policy favor[s] settlements...”); *In re Pfister*, 449 B.R. 422, 425 (Bankr. D.N.M. 2011) (“The law favors resolving controversies through compromise and settlement rather than through litigation. Settlement of litigation is usually a compromise of disputed liability by the parties and is favored as a matter of public policy.”), *citing Williams v. First National Bank*, 216 U.S. 582, 592, 30 S.Ct. 441, 444, 54 L. Ed. 625 (1910).

#### IV.

#### **REQUESTED RELIEF**

46. 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; (c) approving the proposed “**Auction Procedures**” described below and attached as **Exhibit B**; and (d) approving the Settlement Agreement with co-owner Athay attached to the Receiver Declaration as **Exhibit F**.

#### **Sale Free and Clear of Interests**

47. Sale of the Property as proposed is within the scope of the Receiver’s authority under the Receivership Order as quoted in ¶ 3 above and 28 U.S.C. §§ 2001(a) and 2002 both quoted in ¶¶ 42 and 43 above, it is in the best interests of the Receivership Estate, and the sale

serves the purposes of the Receivership Estate by providing a “realization of the true and proper value” of the Property.<sup>51</sup>

48. 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.<sup>52</sup>

49. 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 ¶ 30 above.<sup>53</sup>

#### **Proposed Publication Notice**

50. 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.

51. 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 *Standard-Examiner*, a newspaper published in Ogden, Utah, once a week for a period of four weeks prior to the public sale (the “Publication Notice Time”):

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<sup>51</sup> Receivership Order ¶ 38; Amended Receiver Declaration ¶ 27.

<sup>52</sup> Amended Receiver Declaration ¶ 21.

<sup>53</sup> *Id.* at ¶ 30.

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 2351 Grant Ave., Ogden, UT 84401, consisting of three parcels with the following parcel tax ID numbers: 01-029-0030, 01-029-0035, 01-029-0034 (the “Property”) through a public auction to the highest bidder payable in lawful money of the United States on the \_\_\_ day of \_\_\_\_\_, 2015 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 \$600,000.00 together with a \$20,000.00 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.

The Receiver gives further notice that he has entered into an agreement with the co-owner of the Property, Katy Athay (“Athay”) under which Athay consents to the sale of the Property at Auction to the highest and best bidder. The Receiver anticipates that Athay will be a Qualified Bidder at the Auction, and she will be entitled to credit bid her 50.8% interest in the Property calculated as follows: The highest bid amount at Auction (minus standard closing costs, real property taxes (estimated at \$123,514.78), Athay’s agreed share of expenses for the Property (\$54,708.99) and \$36,000.00 (sales commission)) x .508 + \$18,288.00 (50.8% of sales commission) (the “Credit Bid”). The Credit Bid affords Athay a premium because she is being given credit for her portion of the sales commission in exchange for her agreement to sell the Property and to settle numerous claims with the Receiver related to the Property and her investments with National Note of Utah, LC. Athay will be allowed to use her Credit Bid and a third party lender commitment as a deposit for the sale in lieu of cash. If Athay is not the highest and best bidder at Auction, she will agree to the sale of the Property and be paid 50.8% of the sale proceeds, less her portion of the closing costs, commission, taxes and post-receivership expenses agreed to as stated above.

52. 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**

53. 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 2351 Grant Ave., Ogden, UT 84401, consisting of three parcels with the following parcel tax ID numbers: 01-029-0030, 01-029-0035, 01-029-0034 (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 \$600,000.00 which includes a \$20,000.00 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 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 \$20,000.00 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.

54. 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.

#### **Settlement Agreement**

55. The Receiver requests that the Court approve the Settlement Agreement between the Receivership Estate and Ms. Athay. The Settlement Agreement was negotiated in good faith by the Receiver in an attempt to resolve all claims between the Receivership Estate and Ms. Athay.<sup>54</sup>

56. The Receiver believes the Settlement Agreement is in the best interest of the Receivership Estate and respectfully requests that the Court approve it.<sup>55</sup>

#### **V.**

#### **CONCLUSION**

57. 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; (c) approving the proposed Auction Procedures attached hereto at **Exhibit B**; and (d) approving the Settlement Agreement with co-owner attached to the Receiver Declaration as **Exhibit F**. The Receiver also requests any other relief appropriate under the circumstances.

DATED this 19th day of November, 2015.

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<sup>54</sup> Amended Receiver Declaration ¶ 32.

<sup>55</sup> *Id.*

**DORSEY & WHITNEY LLP**

*/s/ Peggy Hunt* \_\_\_\_\_

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