

Jonathan O. Hafen (6096) (jhafen@parrbrown.com)

Jeffery A. Balls (12437) (jballs@parrbrown.com)

Michael S. Lehr (16496) (mlehr@parrbrown.com)

PARR BROWN GEE & LOVELESS, P.C.

101 South 200 East, Suite 700

Salt Lake City, Utah 84111

Telephone: (801) 532-7840

Facsimile: (801) 532-7750

Attorneys for Court-Appointed Receiver R. Wayne Klein

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.; LTB1,
LLC; R. GREGORY SHEPARD; NELDON
JOHNSON; and ROGER FREEBORN,

Defendants.

**RECEIVER’S MOTION 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**

**(Sherwood Drive, Delta, UT Property
DO-SS-136&137)**

Civil No. 2:15-cv-00828-DN
District Judge David Nuffer

Pursuant to 28 U.S.C. §§ 2001(a) and 2002 and the *Corrected Receivership Order* (“Receivership Order”),¹ Court-Appointed Receiver R. Wayne Klein (the “Receiver”) hereby files this motion (the “Motion”) requesting that the Court authorize him to sell at public auction certain real property of the Receivership Estate. A proposed order (“Sale Order”) is submitted herewith and attached hereto as Exhibit A.

¹[Docket No. 491](#), filed November 1, 2018.

I. FACTUAL BACKGROUND

1. On October 31, 2018, the Receivership Estate was created with the entry of the Receivership Order.² Pursuant to the Receivership Order, the Receiver was appointed, and all of the Receivership Defendants' assets were placed in the Receiver's control.³

2. The Court has directed and authorized the Receiver to do, among other things, the following:

- “[D]etermine the nature, location and value of all property interests of each of the Receivership Defendants”⁴
- “To take custody, control and possession of all Receivership Property and records. . . .”⁵
- “To manage, control, operate, and maintain the Receivership Property and hold in his possession, custody, and control all Receivership Property, pending further order of this Court.”⁶
- “[T]o take immediate possession of all real property of the Receivership Defendants”⁷
- “[L]ocate, list for sale or lease, engage a broker to sell 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 estate, 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

²[Docket No. 490](#). The Corrected Receivership Order was filed on November 1, 2018. *See* [Docket No. 491](#).

³*See* generally, *id.* On May 3, 2019, the Receivership Estate was expanded to include 13 affiliated entities. *See* [Docket No. 636](#).

⁴[Docket No.491](#) at ¶ 13(a).

⁵*Id.* at ¶ 13(b).

⁶*Id.* at ¶ 13(c).

⁷*Id.* at ¶ 20.

⁸*Id.* at ¶ 55.

- “[S]ell and transfer clear title to all real property in the receivership estate,” upon order of the Court “in accordance with such procedures as may be required by this Court and additional authority, such as 28 U.S.C. §§ 2001 and 2002.”⁹

II. REAL PROPERTY TO BE SOLD AT AUCTION AND STALKING HORSE BID

Description of Property

3. The Receivership Order identifies and makes numerous real properties owned by Receivership Defendants part of the Receivership Estate.¹⁰ The Turnover Order¹¹ brought additional real properties into the Receivership Estate, including the property subject to the instant Motion.¹²

4. Relevant to this Motion is a home located on three lots in Delta (Millard County), UT, with frontage on the Gunnison Bend Reservoir (“Property”). The Property was transferred into the Receivership Estate by Glenda Johnson pursuant to the Turnover Order. The address is 490 S. West Sherwood Drive. Together, the three lots have .58 acres and are identified by parcel number DO-SS-136&137, and also described as follows:

Lots 136, 137 and 138 Sherwood Shores, a subdivision, according to the official plat thereof, as recorded in the office of the county recorder of said county.¹³

⁹*Id.* at ¶ 56.

¹⁰*Id.* at ¶ 20.

¹¹*Memorandum Decision and Order Granting Turnover Motion; Denying Motion to Strike; Overruling Objection to Authentication of Exhibits; and Overruling Objection to Rejection of Reputed Contract*, Docket No. 1007, filed September 15, 2020.

¹²*Id.* at 47-48.

¹³*Id.* at ¶ 20(k).

Appraising the Property

5. On May 13, 2020, the Receiver filed a motion seeking to appoint an appraiser for the Property.¹⁴ The Court granted the motion and approved the appointment of Thomas V. Boyer of TVB Management Company (“Appraiser”).¹⁵

6. The Appraiser completed and submitted his appraisal of the Property (the “Appraisal”) to the Receiver, excerpts of which are attached hereto as Exhibit B. The Appraiser valued the Property at \$376,678.¹⁶

Stalking Horse Bid

7. As part of his diligence into a potential sale of the Property, the Receiver contacted a local real estate broker about the Property.

8. On October 14, 2020, the Receiver entered into a listing agreement with Lauri Mathews of Signature Real Estate Services (the “Broker”) to assist with the marketing and sale of the Property.

9. As a result of these marketing efforts, the Receiver received an offer to purchase the Property from Heather M. Turner (the “Buyer”) for \$377,000.

10. The Buyer’s offer is specifically conditioned on the sale closing by January 29, 2021.

11. Because the proposed sale price was at least equal to the appraised value of the Property, the Receiver entered into a conditional Real Estate Purchase Agreement (“Purchase

¹⁴Docket No. 922, filed May 13, 2020.

¹⁵Docket No. 963, filed on April 9, 2019.

¹⁶See Appraisal Report, Ex. B, at 2. Millard County’s 2020 assessed value for the Property is \$250,146.

Agreement”) with the Buyer on or about December 3, 2020, subject to court approval and higher or better offers.

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

Sales Costs and Net Sale Proceeds

13. The Receiver anticipates paying at the time of the Property’s closing the ordinary costs of sale, including market-rate closing costs and a standard 6% real estate commission to the Broker.¹⁷ The gross sale proceeds, less the costs of sale and taxes are referred to herein as the “Net Sale Proceeds.”

14. Any other financial interests against the Property (to the extent they exist and without any waiver of the Receiver’s or the Receivership Estate’s rights and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds.

15. 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.

Free and Clear Sale

16. 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 not in any way waiving any rights, claims, interests, or defenses to any claims or interests made against the Property or the Net Sale Proceeds.

¹⁷2020 property taxes and delinquent 2019 property taxes have been paid. The Receiver will pay a pro-rata share of 2021 property taxes.

17. Any other financial interests against the Property, other than property taxes and closing costs, will not be paid at the time of closing. Rather, any such interests (to the extent they exist and without any waiver of the Receiver's or the Receivership Estate's right and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds.

18. A copy of this Motion is being served on the relevant taxing authority.

Best Interests

19. The Receiver believes that the sale of the Property at public auction with the Stalking Horse Bid 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.

20. The Stalking Horse Bid is slightly greater than 100% of the appraised value of the Property. Through the proposed auction, the purchase price cannot go lower but may increase.

21. Notice of the auction described below will be published in the Millard County Chronicle Progress, a newspaper with regular circulation in Millard County, Utah, posted on the Receiver's website, provided to Defendants via the Court's electronic filing system, and sent by the Receiver to persons who the Receiver has identified as potentially having an interest in the Property.

22. 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 an interest in the Property, if any.

III. APPLICABLE LAW

23. The Corrected 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.

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

at 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.

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

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.

IV. REQUESTED RELIEF

26. The Receiver requests that the Court enter the proposed Sale 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 (c) approving the proposed “Auction Procedures” described below and attached as Exhibit C.

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 Paragraph 2 above and 28 U.S.C. §§ 2001(a) and 2002.

The sale is also in the best interest of the Receivership Estate, and the sale serves the Estate's purposes by providing a "realization of the true and proper value" of the Property.¹⁸

28. The Court may order a sale of the Property free and clear of interests, provided that parties claiming an interest 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.

Proposed Publication Notice

29. To comply with the requirement of publication notice for public sales as 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.

30. Accordingly, the Receiver proposes that the following notice be published in the *Millard County Chronicle Progress*, which is a publication of general circulation in Millard County, Utah, once a week for a period of four weeks prior to the public sale (the "Publication Notice Time"): ¹⁹

R. Wayne Klein, the court-appointed receiver ("Receiver") for RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC, as well as certain of their subsidiaries and affiliates, and the assets of Neldon Johnson and R. Gregory Shepard, in the civil case ("Case") styled *United States v. RaPower-3, LLC*, No. 2:15-cv-00828-DN (D. Utah) gives notice of his intent to sell certain real property ("Property") constituting a home and three land parcels at 490 S. West Sherwood Drive located in Delta City, UT, with parcel number DO-SS-136&137 through a public auction ("Auction") to the highest bidder payable in lawful money of the United States on _____, 2021, at __:__ .m. at the Fourth Judicial District Court in Millard County, 765 S. Highway 99, Ste. 6, Fillmore, UT, or as may be continued from time to time by the Receiver. The Property will be sold at the Auction free and

¹⁸See [Docket No. 491](#), Corrected Receivership Order, ¶ 55.

¹⁹By publishing notice in the *Millard County Chronicle Progress*, the notice will also be available on www.utahlegals.com.

clear of all interests, “as is,” with no representations or warranties. The Receiver has accepted an initial bid of \$377,000.00 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, at least five business days before the Auction, comply with the “Auction Procedures” that have been approved in the Case, which Auction Procedures may be obtained upon request made to attorney Michael S. Lehr, Parr Brown Gee & Loveless, 101 S. 200 E., Ste. 700, Salt Lake City, Utah 84111, mlehr@parrbrown.com.

31. 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

32. The Receiver requests that the Court enter a Sale Order approving the following proposed procedures to govern the public sale (collectively, or as may be amended by the Court’s Sale Order, the “Auction Procedures”), a copy of which is attached hereto as Exhibit C:

- a. The Receiver may conduct an auction of certain real property located in Delta City, UT, with an address of 490 S. West Sherwood Drive, having tax parcel number DO-SS-136&137 (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. The Receiver has received an offer to purchase the Property for \$377,000.00, subject to higher and better bids at the Auction. The Receiver is treating the offer 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 \$5,000.00 as an initial deposit (all

such deposits being collectively, the “Initial Deposit”), by no later than 5:00 p.m. Mountain Time at least 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. Such sale shall be deemed to be a sale of the Property at public auction under all applicable law.
- g. The Auction will take place at the Fourth District Court in Millard County, 765 South Highway 99, Suite 6, Fillmore, UT 84631.
- h. 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”).
- i. 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”).

- j. Each Initial Deposit shall be retained by the Receiver until the 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 the 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.
- k. 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 the Stalking Horse Bid; and (ii) must deliver to the Receiver an additional non-refundable deposit of 50% of the purchase price accepted at Auction (the "50% Deposit"). In the event that the Sale Closing Date does not occur for the Successful Bidder, the Successful Bidder's Initial Deposit and this 50% Deposit will be retained by the Receiver as damages.

33. 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.

34. Counsel for the United States has informed the Receiver that it does not oppose the Receiver's plans to sell this Property at auction.

CONCLUSION

For the reasons set forth herein, the Receiver requests that the Court enter the proposed Sale 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 attached hereto at Exhibit C. The Receiver also requests any other relief appropriate under the circumstances.

DATED this 8th day of December 2020.

PARR BROWN GEE & LOVELESS

/s/ Jeffery A. Balls

Jonathan O. Hafen

Jeffery A. Balls

Michael S. Lehr

Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing was electronically filed with the Clerk of the Court through the CM/ECF system on December 8, 2020, which sent notice of the electronic filing to all counsel of record. The foregoing also was sent by U.S. Mail, postage prepaid, to:

Millard County Auditor
50 South Main Street
Fillmore, UT 84631

/s/ Wendy V. Tuckett _____