

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 SEEKING
AUTHORIZATION TO SELL ELK
RIDGE, UTAH HOME FREE AND
CLEAR OF PURPORTED
INTERESTS**

Civil No. 2:15-cv-00828-DN

District Judge David Nuffer

Pursuant to 28 U.S.C. §§ 2001(b) 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 by private sale 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
- “[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

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

³See 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.

required by this Court and additional authority, such as 28 U.S.C. §§ 2001 and 2002.”⁹

II. REAL PROPERTY TO BE SOLD

Description of Property

3. The Receivership Order identifies and makes numerous real properties owned by Receivership Defendants part of the Receivership Estate.¹⁰

4. Relevant to this Motion is a home in Elk Ridge, Utah that was obtained by the Receiver through foreclosure proceedings in January 2020. The home is located at 87 West Skyhawk Way in Elk Ridge (Utah County), Utah (“Property”).

Appraising the Property

5. On March 27, 2020, the Receiver filed a motion seeking to appoint three appraisers for the Property.¹¹ The Court granted the motion and approved the appointments of Michael Nyman (“Nyman”) of Lakeshore Appraisals, Kevin Cloward (“Cloward”) of KC Appraisals, and Matt McKell (“McKell”) of McKell, Beeton & Winn (collectively, “Appraisers”).¹²

6. The Appraisers completed and submitted their appraisals of the Property. Nyman appraised the Property at \$395,000 (the “Nyman Appraisal”), attached hereto as Exhibit B. Cloward appraised the Property at \$405,000 (the “Cloward Appraisal”), attached hereto as Exhibit C. McKell appraised the property at \$470,000 (the “McKell Appraisal”), attached hereto as Exhibit D.

⁹*Id.* at ¶ 56.

¹⁰*Id.* at ¶ 20.

¹¹Docket No. 894, filed March 27, 2020.

¹²Docket No. 921, filed on May 5, 2020.

Obtaining Title, Marketing of the Elk Ridge Home

7. International Automated Systems (“IAS”) obtained title to the Property on January 28, 2020 through a trustee’s sale. The prior owners, who owed a promissory note to IAS and had granted a lien on their home to secure the note, voluntarily vacated the Property in advance of the trustee’s sale. The Receiver paid the prior owners \$2,000 for voluntarily vacating the Property.

8. On May 8, 2020, the Receiver paid \$234,270.11 to Wells Fargo Home Mortgage to satisfy an existing mortgage on the Property. The Receiver is not aware of any other liens on the Property.

9. The Receiver changed the locks on the home, obtained insurance on the Property, and had utilities put into his name.

10. On or about March 20, 2020, the Receiver entered into a listing agreement with Matt Evans of Summit Realty (the “Broker”) to assist with the marketing and sale of the Property. The Property was listed for sale at \$424,500.

11. At the suggestion of the Broker, the Receiver installed new carpeting, repainted the interior of the home, and installed sprinklers in the backyard of the home.

12. As a result of marketing efforts by the Broker, the Receiver received two offers to purchase the Property, the highest of which was an offer of \$429,000 from Amara and Benjamin Lavaki (the “Buyer”). The Receiver made a counteroffer that accepted the purchase amount but changed certain conditions of the sale. The Receiver’s counteroffer was accepted (“Purchase Agreement”) A copy of the Purchase Agreement is attached as Exhibit E.

Material Terms of the Sale

13. The Receiver has conditionally agreed to sell the Property to the Buyer for \$429,000. An earnest money deposit of \$1,000 has been made by the Buyer.

14. The Purchase Agreement is subject to certain conditions, including due diligence, appraisal, and financing. The Buyer provided information showing they were pre-qualified for a loan of up to \$430,000. The appraisal condition provides that if the property does not appraise for at least 95% of the purchase price, the Buyer can withdraw its offer. All three conditions must be satisfied or waived within 42 days after the date of the July 14, 2020 Purchase Agreement. The Receiver has agreed to reimburse Buyer for the costs of the appraisal and due diligence if this Motion is not approved by the Court.

15. The Receiver has agreed to pay up to \$450.00 for a home warranty.

16. The sale must close within 60 days from the Purchase Agreement.

Sales Costs and Net Sale Proceeds

17. The Receiver anticipates paying at the time of the Property's closing all outstanding property taxes and the ordinary costs of sale, including market-rate closing costs and a below-market 5.5% real estate commission to the Broker. The gross sale proceeds, less the costs of sale and taxes are referred to herein as the "Net Sale Proceeds."

Free and Clear Sale

18. 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.

19. 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.

20. 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.

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

Publication Notice

22. Contemporaneously herewith the Receiver filed *Receiver's Ex Parte Motion for Order Approving Method and Form of Publication Notice of Sale of Real Property*, seeking the Court's approval of the method and form of proposed publication notice.¹³

23. Upon entry of an Order granting the Publication Motion, the Receiver will publish notice of the proposed sale in *The Daily Herald*, a newspaper published in Utah County, Utah, using the method and form of notice approved by the Court.

Best Interests

24. The Receiver believes that the sale of the Property at private sale 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 Purchase Agreement, which was obtained through good faith and arms' length negotiations.

25. The purchase price is above the listing price, higher than two of the three appraisals, and higher than the \$423,333 average of the three appraisals.

¹³Docket No. 972, filed July 22, 2020.

26. Notice of the proposed sale will be published in a newspaper in Utah 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.

27. Upon completion of the sale, the Receiver will file with the Court a "Notice of Sale Results," stating whether higher offers were received and reporting on the Net Sale Proceeds of the sale. This Notice of Sale Results will be served on any parties asserting an interest in the Property.

III. APPLICABLE LAW

28. The Corrected Receivership Order provides that the Court may require that the proposed sale of real property satisfy 28 U.S.C. § 2001.¹⁴ Subsection (b) of § 2001 permits, with Court approval, a private sale of receivership property as proposed herein, but it conditions such sale on (1) obtaining a purchase price that is no less than two-thirds of the appraised value of the property; (2) appointing "three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities[;]" (3) publication notice of the sale "at least ten days before confirmation[;]" and (4) cancellation of the sale "if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale."¹⁵ Here, the Receiver has complied with each of these factors, to the extent that they exist.

¹⁴Corrected Receivership Order, [Docket No. 491](#) at ¶ 56.

¹⁵28 U.S.C. § 2001(b).

29. Specifically, factor (1) is met in this case inasmuch as the purchase price for the Property is over 100% of the average appraised value, and therefore far exceeds the 2/3 requirement.

30. Factor (2) is met because the Court has appointed the Appraisers. Based on three appraisals made by the Appraisers, the Purchase Agreement does not propose a sale that is at a price less than two-thirds of the appraised value.

31. Factor (3) has been met as the Receiver will publish notice of the proposed sale immediately upon the Court's entry of an Order approving the method and form of such notice.

32. Factor (4) also has been met, inasmuch as the Receiver understands that the sale will not be approved if he receives a higher and better offer that is in compliance with § 2001(b) as quoted above and the sale is conditioned on this factor.

IV. REQUESTED RELIEF

33. The Receiver requests that the Court grant the Motion, thus authorizing the Sale of the Elk Ridge home pursuant to the Purchase Agreement, free and clear of any purported interests.

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

DATED this 23rd day of July 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 July 23rd, 2020, which sent notice of the electronic filing to all counsel of record.

IT IS FURTHER CERTIFIED that, on the same date, by U.S. Mail, first-class, postage prepaid, I caused to be served the same documents upon the following:

Utah County Treasurer
100 East Center Street, Suite 1200
Provo, UT 84606

/s/ Jeffery A. Balls