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*Attorneys for Court-Appointed Receiver R. Wayne Klein*

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

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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**

**(607-Acre Texas Property R000046407,  
R000046408)**

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

District Judge David Nuffer

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Pursuant to 28 U.S.C. §§ 2001(a) and 2002 and the *Corrected Receivership Order* (“Order”),<sup>1</sup> 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 realproperty of the Receivership Estate. A proposed Order (“Sale Order”) is submitted herewith

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<sup>1</sup> Docket No. 491, filed November 1, 2018.

and attached hereto as Exhibit A.

## I. FACTUAL BACKGROUND

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

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

- “To take custody, control and possession of all Receivership Property and records. . . .”<sup>4</sup>
- “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.”<sup>5</sup>
- [T]o take immediate possession of all real property of the Receivership Defendants . . . .”<sup>6</sup>
- “[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.”<sup>7</sup>
- “[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.”<sup>8</sup>

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

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

<sup>4</sup> *Id.* at ¶ 13(b).

<sup>5</sup> *Id.* at ¶ 13(c).

<sup>6</sup> *Id.* at ¶ 20.

<sup>7</sup> *Id.* at ¶ 55.

<sup>8</sup> *Id.* at ¶ 56.

3. On May 3, 2019, the Court expanded the Receivership Estate to include thirteen identified subsidiaries and affiliates (“Affiliates Order”), including the N.P. Johnson Family Limited Partnership (“NPJFLP”).<sup>9</sup> The Affiliates Order made assets of the NPJFLP part of the Receivership Estate<sup>10</sup> and gave the Receiver the same rights and powers over assets of the affiliated entities as with assets of the original Receivership Entities.<sup>11</sup>

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

**Texas Property**

4. The Order and Affiliates Order identify and make numerous real properties owned by Receivership Defendants part of the Receivership Estate.<sup>12</sup>

5. Relevant to this Motion are two parcels of real property owned by NPJFLP, located in Howard County, Texas (“Property”). These parcels are a 608.68-acre parcel identified by parcel number R000046407 and an adjacent 18.38-acre parcel identified by parcel number R000046408.<sup>13</sup>

6. The Property does not include subsurface mineral rights, which were reserved by a prior owner of the Property. The Property is subject to several easements.

**Appraising the Property, Survey**

7. On December 30, 2019, the Receiver filed a motion seeking to appoint appraisers for the Property (“Appraiser Motion”).<sup>14</sup> The Court granted the motion and approved the

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<sup>9</sup> [Docket No. 636](#).

<sup>10</sup> *Id.* Order, at ¶¶ 1-2.

<sup>11</sup> *See Id.* at ¶¶ 6, 12.

<sup>12</sup> *Id.* at ¶ 20.

<sup>13</sup> *Id.* at ¶¶ 20(cc) and (dd).

<sup>14</sup> [Docket No. 829](#).

appointments of Victor R. Probandt (“Probandt”), Clint W. Bumguardner (“Bumguardner”), and Bill Beam (“Beam”) as appraisers (“Appraisers”).<sup>15</sup>

8. The Appraiser Motion noted that the Receiver had preliminarily accepted an offer to purchase the Property and needed the appraisals to satisfy 28 U.S.C. § 2001(b), the private sale requirements. A private sale requires obtaining three independent appraisals and the sale must be for an amount at least two-thirds of the average appraised value from the three appraisals. Because the assessed valuation of the property was approximately \$654,000 and there were few expressions of interest in the property during the first four months of its listing (suggesting that the appraised value might be lower than the assessed value), the Receiver agreed to the buyer’s request to seek approval of the sale as a private sale under 28 U.S.C. § 2001(b).

9. The first appraisal report, by Probandt, valued the combined 627.06-acre tract at \$784,000. A copy of the Probandt appraisal is attached hereto as Exhibit B. The Receiver also obtained a survey of the property, which will be provided to the buyer and bidders at the auction.<sup>16</sup>

10. If the other two appraisals value the property at amounts near that of the Probandt appraisal,<sup>17</sup> the sale to the prospective buyer at \$400,000.00 will not qualify for approval as a private sale. The buyer has now agreed to the Receiver’s proposal to sell the property at auction, as a public sale under 28 U.S.C. § 2001(a) and § 2002.

11. As such, the Receiver has determined that it is in the best interest of the Receivership Estate to sell the Property in its “as is” condition, via public sale.

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<sup>15</sup> Docket No. 854, filed February 3, 2020.

<sup>16</sup> The property survey indicates that the actual property size is 628.32 acres.

<sup>17</sup> The Receiver expects the other appraisers will use the same property sales in the area as comparable sales, suggesting that the other appraisal reports will assign values close to that of the Probandt appraisal.

**Stalking Horse Bid**

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

13. On or about July 29, 2019, the Receiver entered into a listing agreement with Gloria Pierce of Home Realtors (the “Broker”) to assist with the marketing and sale of the Property.

14. On December 10, 2019, the Receiver received an offer by Anthony Lab Holdings, LLC to purchase the Property for \$400,000. The Receiver entered into a conditional Unimproved Property Contract (“Purchase Agreement”) with Anthony Lab Holdings (the “Buyer”), subject to court approval and higher or better offers.

15. Because the Buyer was unwilling to expend funds to conduct due diligence on the property until after the Receiver could commit to sell the property to Buyer, the Receiver was concerned that the Buyer would not be able to close until expiration of a due diligence period 60 days after the signing of a definitive purchase agreement. As a result, the Receiver has agreed to reimburse any out-of-pocket due diligence fees to Buyer, incurred before the auction date, if Buyer is not the ultimate buyer of the Property.

16. The Receiver proposes to use the offer by Anthony Lab Holdings as a stalking horse bid (the “Stalking Horse Bid”) at the public auction described below.

**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.

The gross sale proceeds, less the costs of sale and taxes are referred to herein as the “Net Sale Proceeds.”

18. 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**

19. 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.

20. 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’s or the Receivership Estate’s right and defenses related thereto) will survive the sale and will attach to the Net Sale Proceeds.

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

**Best Interests**

22. 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.

23. Notice of the auction described below will be published in a newspaper in Howard County, Texas, posted on the Receiver’s website, and provided to Defendants via registered mail or the Court’s electronic filing system.

24. 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**

25. 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.

26. 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.

27. 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**

28. 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**

29. 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 interests 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.

30. 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**

31. 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.

32. Accordingly, the Receiver proposes that the following notice be published in the Big Spring Herald which is a publication of general circulation in Howard County, Texas, once a week for a period of four weeks prior to the public sale (the "Publication Notice Time"):

R. Wayne Klein, 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 (the "Receiver") in the civil case styled as *United States of America v. RaPower-3, LLC et al.*, Civ. Case No. 2:15-cv-00828-DN (D. Utah) ("Civil Case"), gives notice of his intent to sell certain real property located in Howard County, TX, with parcel numbers R000046407 and R000046408 (the "Property") through a public auction to the highest bidder payable in lawful money of the United States on the \_\_ day of \_\_\_\_, 2019 at the hour of \_\_ at the Howard County District Court, 312 Scurry, Big Spring, TX 79721, 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 \$400,000.00 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 comply with the “Auction Procedures” that have been approved in the Civil Case at least five business days before the Auction, which Auction Procedures may be obtained upon request made to the Receiver’s counsel at: Parr Brown Gee & Loveless, attn: Michael S. Lehr, 101 South 200 East, Suite 700, Salt Lake City, Utah 84111; mlehr@parrbrown.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 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 Howard County, TX, identified by parcel numbers R000046407 and R000046408 (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 \$400,000.00, 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 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 Daylight 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 without contingencies; 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 Howard County District Court, 312 Scurry, Big Spring, TX 79721.
- 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 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.
- 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 except that no allowance will be given for due diligence expenses; 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.

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.

36. 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 13th day of February, 2020.

**PARR BROWN GEE & LOVELESS**

*/s/ Michael S. Lehr* \_\_\_\_\_  
Jonathan O. Hafen  
Michael S. Lehr  
*Attorneys for Receiver*

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the above **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 (TEXAS PROPERTY)** was electronically filed with the Clerk of the Court through the CM/ECF system on February 13<sup>th</sup>, 2020, which sent notice of the electronic filing to all counsel of record.

A copy of the motion was mailed to:

Howard County Tax Assessor  
315 Main Street, Suite D  
Big Spring, TX 79721

/s/ Michael S. Lehr