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

COMMODITY FUTURES TRADING
COMMISSION, and

STATE OF UTAH DIVISION OF
SECURITIES, through Attorney General
Sean D. Reyes

Plaintiffs,
v.

RUST RARE COIN INC., a Utah corporation,
and GAYLEN DEAN RUST, an individual,

Defendants;

and

DENISE GUNDERSON RUST, an individual,
JOSHUA DANIEL RUST, an individual,
ALEESHA RUST FRANKLIN, an individual,
R LEGACY RACING INC, a Utah
corporation, R LEGACY ENTERTAINMENT
LLC, a Utah limited liability company, and R
LEGACY INVESTMENTS LLC, a Utah
limited liability company.

Relief Defendants.

**MOTION TO APPROVE USE OF
BROKER'S PRICE OPINIONS,
COMPARATIVE MARKET
ANALYSES, RESTRICTED
APPRAISAL REPORTS, OR SIMILAR
VALUATION PROCEDURE, IN
APPRAISAL OF CERTAIN
COMMERCIAL PROPERTIES**

HEARING REQUESTED

Civil No. 2:18-cv-00892-TC

Jonathan O. Hafen, the Court-Appointed Receiver, hereby submits this Motion to Approve the Use of Broker's Price Opinions, Comparative Market Analysis, Restricted Appraisal Reports or Similar Valuation Procedure, for two of the three appraisals necessary for each of the Commercial Properties listed below.

INTRODUCTION

The Receiver is the owner of commercial properties located in Utah and Alaska at the following addresses: (1) the "Brick Room", located at 78 West Center Street, #100, Provo, Utah; (2) Huge Studios, located at 352 South 500 East, Salt Lake City, Utah; (3) the "Spit Property", located at 4025 Homer Spit Road, Homer, Alaska; (4) the "Main Street Property", located at 3657 Main Street, Homer, Alaska; and (5) the "Beach House", located at 1121 Seabreeze Ct., Homer, Alaska (collectively, the "Commercial Properties"). Pursuant to 28 U.S.C. § 2001, the Receiver is required to seek this Court's approval of the appointment of three appraisers to assist the Court and the Receiver in valuing each of the Commercial Properties prior to seeking this Court's approval to sell any such property. The requirement of three disinterested appraisers for each Receivership Property ensures a fair and disinterested valuation. However, this appraisal process also imposes significant burdens on the assets of the Receivership Estate, as each separate appraisal may cost the Receivership Estate thousands of dollars to complete. In the interest of preserving the assets of the Receivership Estate—and in keeping with the statutory requirements to provide three fair and disinterested property valuations to this Court—the Receiver hereby seeks approval to obtain one traditional appraisal and two broker's price opinions, comparative market analyses, restricted appraisal report or similar valuation product for each of the Commercial Properties. The Receiver believes that this process is consistent with 28 U.S.C. §§ 2001 and will provide the Court with fair and disinterested valuation information

for each of the Commercial Properties, while at the same time significantly reducing costs to the Receivership Estate.

MEMORANDUM

This Court's November 27, 2018 Order Appointing Receiver and Staying Litigation, Dkt. No. 54 (the "Order"), authorizes and directs the Receiver to take control of Defendants' assets and provides: "Upon further Order of this Court, pursuant to such procedures as may be required by this Court and additional authority such as 28. U.S.C. § 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, all real property to the Receivership Estates." (Order, Dkt. No. 54, at 15 ¶ 38). The Order also contemplates that the Receiver would employ professionals to assist him in discharging his duties, including financial and business advisers as well as real estate agents:

To engage and employ persons in his discretion to assist him in carrying out his duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, securities traders, registered representatives, financial or business advisers, liquidating agents, real estate agents, forensic experts, brokers, traders or auctioneers;

(Order, Dkt. No. 54 at 5 ¶ 8(F)).

Title 28, Section 2001(b) of the United States Code authorizes a court to order the sale of real property at a private sale if the court finds that the sale is in the best interest of the estate after considering the evaluation of three appraisers appointed by the court (the sale may not be less than two-thirds of the appraised value) and after providing notice of the hearing at least 10 days before the hearing confirming the same.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint 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. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed 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.

28 U.S.C. §§ 2001(b).

In separate motions filed with the Court on February 11, 2019 [Docket Nos. 108, 109 and 110] and on February 26, 2019 [Docket Nos. 124 and 126], the Receiver requested the Court's confirmation of three qualified and disinterested appraisers (each, a "Qualified Appraiser" and, collectively, the "Qualified Appraisers") for each of the Commercial Properties. In this Motion, the Receiver now requests the Court's approval to engage two of the three Qualified Appraisers to provide the Receiver with broker's price opinions, comparative market analyses, restricted appraisal reports, or similar valuation procedure, in lieu of full commercial appraisals of the Commercial Properties. A broker's price opinion is a written analysis estimating the price for specified parcel of real property based on, among other things, a site inspection and a comparison to similar properties on the market. A comparative market analysis is a qualitative analysis performed by an appraiser/broker that contains information on recently sold properties, pending sales, active listings, cancelled, expired and withdrawn listings. A restricted appraisal report is valuation of a property similar to a regular appraisal but the information that forms the basis of the appraisal is not included within the document itself and is available for reference should that prove necessary.

Given the number, variety, and location of the Commercial Properties, the need to provide three full appraisals from three separate appraisers for each of the Commercial

Properties, the cost of these appraisals will run in excess of tens of thousands of dollars. For example, obtaining full commercial appraisals for the Commercial Properties in Alaska is estimated to cost approximately \$40,000.00. The Receiver expects that the alternative procedures will cost less than half of this amount. Moreover, based on the estimates provided by the relevant appraisers, the procedure described above would reduce the cost of the appraisal of Big Door from \$9,100 to \$6,500 and would reduce the cost of the appraisal of Huge Studios from \$10,000 to \$7,250.

Rather than burden the assets of the Receivership Estate with the extraordinary cost of these appraisers, the Receiver proposes to engage one of the Qualified Appraisers to perform a full appraisal of each of the Commercial Properties and to engage two of the Qualified Appraisers to provide a broker's price opinion, comparative market analysis, restricted appraisal report, or similar valuation procedure of each of the Commercial Properties. While 28 U.S.C. §§ 2001(b) requires that this Court "appoint three disinterested persons to appraise such property," the term "appraisal" is not a defined term in the statute. Black's Law Dictionary makes clear that "appraisal" merely requires "[t]he determination of what constitutes a fair price for something or how its condition can be fairly stated; the act of assessing the worth, value or condition of something." *See Black's Law Dictionary* 122 (10th ed. 2014). The Receiver is confident that the combination of a full appraisal from a single disinterested and qualified appraiser and two disinterested and qualified broker's price opinions, comparative market analyses, restricted appraisal report, or similar valuation procedures, would provide this Court with information sufficient to assess what constitutes a fair price for the Receiverships Properties, consistent with 28 U.S.C. §§ 2001(b), while at the same time preserving tens of thousands of dollars in assets of the Receivership Estate.

This Court “has wide discretion in judging whether a receiver’s sale is fair in terms and result and serves the best interests of the estate.” *Fleet National Bank v. H&D Entertainment, Inc.*, 96 F.3d 532, 540 (1st Cir. 1996); *United States v. Peter*, 777 F.2d 1294, 1298 n.6 (7th Cir. 1985) (“It is well established that confirmation of a judicial sale rests in the sound discretion of the district court and will not be disturbed on appeal except for abuse.”). Moreover, “appellate courts will not disturb the exercise of a district court’s discretion in setting the terms and conditions for a judicial sale and the confirmation thereof.” *United States v. Branch Coal*, 390 F.2d 7, 10 (3rd Cir. 1968).

Federal district courts have accepted the broker’s price opinions, comparative market analyses, restricted appraisal reports, or similar valuation procedures to meet the requirements for 28 U.S.C. 2001(b). *See, e.g., Motion to Sell Real Property, Hays v. Sitton*, Case No. 06-cv-00496, Dkt. No. 81 (E.D. Tx. March 11, 2009) (attached as Exhibit 1) (offering a broker’s price opinion, a comparative market analysis, and a full appraisal to satisfy the requirements of 28 U.S.C. § 2001(b)); *Order Confirming Receiver’s Sale of Real Property*, Case No. 06-cv-00496, Dkt. No. 84 (E.D. Tx. March 30, 2009) (attached as Exhibit 2) (approving sale). *See also, Notice and Motion for Order Approving Sale of Walnut Property*, Case No. 14-cv-02334 (September 9, 2014) (attached as Exhibit 3) (offering broker’s price opinions to satisfy the requirements of 28 U.S.C. § 2001(b)); *Order Approving Sale of Walnut Property*, Case No. 14-cv-02334 (September 9, 2014) (attached as Exhibit 4) (approving sale). In the Receiver’s review of the relevant case law, only one court has declined to accept a broker’s price opinion as an appraisal. *See United States Securities and Exchange Commission v. Fujinaga*, 13-cv-01658, Dkt. No. 451 (D. Nev. Oct. 2, 2017) (attached as Exhibit 5). However, in that case, the district court expressly found that the broker offering the price opinion was not “disinterested” as required by Section 2001(b)

(because he had been hired to sell the property in question). *Id.* at 3.¹

The Receiver will continue to comply with all statutory requirements in the sale of the Commercial Properties, including seeking the Court's approval of any sale of real property and ensuring that no private sale is confirmed at a price less than two-thirds of the appraised value of each Commercial Property.

CONCLUSION

Based upon the foregoing, the Receiver requests that this Court grant his motion by entering an order approving the use of broker's price opinions, comparative market analyses, restricted appraisal reports, or similar valuation procedure, for two of the three appraisals for each of the Commercial Properties.

DATED this 1st day of March, 2019.

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¹ The court also found significant that the broker's price opinion in question expressly stated that the opinion "should not be considered an appraisal" because the broker had not "followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice and Appraisal Foundation." *Id.* at 3. However, as noted above, Section 2001(b) does not define the term "appraisal" and certainly imposes no requirement that an assessment of the value of the subject property be available according to the "Uniform Standards of Professional Appraisal Practice and Appraisal Foundation." Section 2001(b) is simply concerned with ensuring that the Receiver provide the Court and interested parties with notice of a fair and impartial valuation from disinterested appraisers.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2019, I caused a true and correct copy of Motion To Approve Use Of Broker's Price Opinions, Comparative Market Analyses, Restricted Appraisal Reports, Or Similar Valuation Procedure, In Appraisal Of Certain Commercial Properties be electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

I hereby certify that on the 1st day of March, 2019, I caused a true and correct copy of the Motion to Approve Use of Broker's Price Opinions, Comparative Market Analyses, Restricted Appraisal Reports, Or Similar Valuation Procedure, In Appraisal of Certain Commercial Properties to be sent via email and/or U.S. Mail to the following parties and their counsel:

Aleesha Rust Franklin
c/o Erik Groves
The Law Office of Erik R. Groves
3851 Homer Spit Road
Homer, AK 99603

I hereby certify that on the 1st day of March, 2019, I caused a true and correct copy of the Motion to Approve Use of Broker's Price Opinions, Comparative Market Analyses, Restricted Appraisal Reports, Or Similar Valuation Procedure, In Appraisal of Certain Commercial Properties to be sent via email to all those on the master mailing matrix and that it was posted on the Receiver's website.

DATED this 1st day of March, 2019.

PARR BROWN GEE & LOVELESS

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