

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

IN RE:)	
)	
GORDON BURR)	Case No. 17-20537-JGR
SSN: XXX-XX-2644)	Chapter 11
)	
Debtor.)	

**MOTION TO APPROVE CONSIGNMENT AGREEMENT FOR CERTAIN ARTWORK
AND AUTHORIZE SALE OF ARTWORK FREE OF LIENS, CLAIMS AND
ENCUMBRANCES**

The Debtor and Debtor in Possession, Gordon Burr (“Debtor”), by and through his attorneys, Buechler & Garber, LLC., for his Motion to Approve Consignment Agreement for Certain Artwork and Authorize Sale of Artwork Free of Liens, Claims and Encumbrances, respectfully states as follows:

BACKGROUND

The Debtor

1. The Debtor filed his Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code on November 16, 2017 (the “Petition Date”). The Debtor remains a debtor in possession.
2. The Debtor is an individual who resides in Castle Rock, Colorado.
3. Among the Debtor’s assets are eight pieces of valuable artwork that the Debtor either owns individually or jointly with his non-filing spouse (the “Artwork”).
4. The Artwork is encumbered by the first priority lien of CoBiz Bank.
5. The Debtor and CoBiz Bank have entered into an adequate protection agreement which contemplates, among other things, the sale of the Artwork. At the time of the preparing of this Motion, the notice period for the motion for approval of the adequate protection agreement had not yet run.
6. Given the nature and value of the Artwork it has been determined that the marketing and sale of the Artwork should be conducted through an art gallery who regularly sells high end artwork.

The Consignment Agreement

7. The Debtor has entered into a Consignment Agreement for the marketing and sale of the Artwork with Masters Gallery (the “Gallery”). A true and correct copy of the Consignment Agreement is attached hereto as Exhibit A.

8. The pertinent terms of the Consignment Agreement are:

- a. The Gallery shall serve as the agent for the exclusive purpose of marketing and selling the Artwork.
- b. The Artwork is being provided to the Gallery on a consignment basis.
- c. The term of the Consignment Agreement expires on September 30, 2018.
- d. The Gallery shall be responsible for the delivery of the Artwork from the Debtor to the Gallery.
- e. Attached as the final page to the Consignment Agreement is a list of the Artwork, including the description of each piece of Artwork, the artist, who owns the Artwork (the Debtor, the non-filing spouse, or joint ownership) and the purchase price or estimated market replacement cost for each piece of Artwork.
- f. While the Gallery shall use its best effort to sell the Artwork at the highest and best price, in no event shall any piece of Artwork be sold for less than 70% of the listed purchase price or estimated market replacement price.
- g. The sale of the Artwork shall be free of all liens, claims and encumbrances.
- h. The Gallery’s commission shall be 50% of the retail price received from the sale of the Artwork.

9. The Gallery has been selected by the Debtor because it has considerable experience in selling artwork such as the Artwork. The Gallery has multiple locations including in Cherry Creek, Vail and Santa Fe. The Gallery can therefore locate each piece of Artwork in the location most likely to maximize value.

RELIEF REQUESTED

10. The Debtor is seeking court approval of the Consignment Agreement and authorization to sell the Artwork free and clear of all liens, claims and encumbrances.

Approval of the Consignment Agreement

11. The Consignment Agreement provides the best means for liquidating the Artwork. The Debtor needs an art gallery such as the Art Gallery to market and sell the Artwork. Given the nature and value of the Artwork, expertise is required to maximize value. Further, parties in the market for high end artwork are most likely to look to an art gallery for such purchases.

12. The Consignment Agreement was negotiated at arms-length.

13. The Debtor believes the commission is fair and reasonable; and is standard in the market place.

14. The marketing and selling of the Artwork will also expose the Artwork to the market place to assure the highest and best offer is received.

15. The Debtor is therefore seeking Court approval of the Consignment Agreement.

Sale of the Art

16. The Debtor is seeking Court approval to sell the Artwork in accordance with the terms of the Consignment Agreement.

17. Section 363(b) of the Bankruptcy Code provides authority for a trustee and, through the application of Bankruptcy Code section 1107(a), a debtor-in-possession, “after notice and a hearing, [to] use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Further, section 105(a) of the Bankruptcy Code allows the Court to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

18. The Bankruptcy Court’s power to authorize a sale under section 363(b) is to be exercised at the Court’s discretion. In re WPRV-TV, Inc., 983 F.2d 336, 340 (1st Cir. 1993); New Haven Radio, Inc. v. Meister (In re Martin-Trigona), 760 F.2d 1334, 1346 (2d Cir. 1985); Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1069 (2d Cir. 1983).

19. Courts have authorized a sale of a debtor's assets pursuant to section 363(b) of the Bankruptcy Code or in the absence of a reorganization plan where there is a "sound business purpose." In re Delaware & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991); Titusville Country Club v. Penn Bank (In re Titusville Country Club), 128 B.R. 396 (Bankr. W.D.Pa. 1991); In re Industrial Valley Refrigeration and Air Conditioning Supplies, Inc., 77 B.R. 15 (Bankr. E.D.Pa. 1987). See also, Stephens Indus., Inc. v. McClune, 789 F.2d 386 (6th Cir. 1986); In re Lionel Corp., 722 F.2d at 1071 (setting forth the "sound business purpose" test in the context of a sale of assets under section 363(b) of the Bankruptcy Code).

20. It is in the best interests of the Debtor, his estate and his creditors to sell the Artwork as it will reduce the secured claim of CoBiz, thereby reducing or eliminating any potential deficiency claim.

21. Courts have also required that the sale price be fair and reasonable and that the sale be the result of good-faith negotiations with the buyer. In re Abbotts Dairies of Pa., 788 F.2d 143, 147-50 (3rd Cir. 1986); In re Tempo Technology Corp., 202 B.R. 363, 367 (D. Del. 1996), aff'd sub nom. Diamond Abrasives Corp. v. Temtechco, Inc. (In re Temtechco, Inc.), 141 F.3d 1155 (3d Cir. 1998); In re Industrial Valley, 77 B.R. at 22; In re Stroud Ford, Inc., 163 B.R. 730 (Bankr. M.D. Pa. 1983); See also In re Ewell, 958 F.2d 276 (9th Cir. 1992) (declining to set aside or modify a sale pursuant to section 363 of the Bankruptcy Code because the price was fair and reasonable and the buyer was a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code).

22. While the Bankruptcy Code does not define "good faith," courts have held that for purposes of section 363(m), a "good faith purchaser" is one who buys "in good faith" and "for value" and that lack of good faith is shown by fraud, collusion, or an attempt to take grossly unfair advantage of other bidders. In re Abbotts Diaries of PA., 788 F.2d at 147; In re Tempo Technology Corp., 202 B.R. at 367.

23. The Consignment Agreement sets a floor price by which the Artwork can be sold, setting reasonable boundaries under which the Gallery can operate in marketing and selling the Artwork, maximizing the value of the Artwork for the estate. Exposure of the Artwork through an art gallery will expose the Artwork to the market place helping to obtain the highest and best price through an arm's length retail process.

24. The Debtor requests authorization to sell the Artwork free and clear of liens, claims and encumbrances and other interests. Section 363(f) of the Bankruptcy Code authorizes a debtor in possession to sell property under section 363(b) “free and clear of any interest in such property of an entity other than the estate” if one of the following conditions is satisfied:

- (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

25. The Debtor believes the proposed adequate protection agreement between the Debtor and CoBiz Bank provides the Debtor with the consent of the valid lien holder.

26. To the extent it does not, the lienholder could be compelled to accept a money satisfaction of their interests, thereby satisfying § 363(f)(5) of the Bankruptcy Code. See, e.g., In re James, 203 B.R. 449, 453 (Bankr. W.D.Mo. 1997); In re Grand Slam U.S.A., Inc., 178 B.R. 460, 463-64 (E.D. Mich. 1995); WPRY-TV, Inc., 143 B.R. at 321. Courts considering this issue have held that the “cramdown” provision under the Bankruptcy Code constitutes such a “legal or equitable proceeding” and permits a sale free and clear pursuant to section 363(f)(5). See, e.g., Grand Slam U.S.A., Inc., 178 B.R. at 464; Scherer v. Federal National Mortgage Association (In re Terrace Chalet Apartments), 159 B.R. 821, 829 (N.D. Ill. 1993); In re Healthco Int’l, Inc., 174 B.R. 174, 176-77 (Bankr. D.Mass. 1994).

Payment of Secured Claims and Closing Costs

27. The sale proceeds will be used to satisfy all costs associated with the sale, including the Gallery’s commission, and then liens, claims and encumbrances of upon the Artwork in the order of their priority to the extent proceeds exist.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court enter an Order, a proposed form is filed herewith, (a) approving the Consignment Agreement; (b) authoring the Debtor to sell the Artwork free and clear of liens, claims and encumbrances; (c) authorizing all sale costs to be paid from proceeds of the sale, including the Gallery's commission; (d) authorizing the payment the liens, claims and encumbrances upon the Artwork in the order of their priority to the extent proceeds exist and (e) and for such further and additional relief as to the Court may deem just and proper.

Dated: February 22, 2018

Respectfully submitted,

By: /s/ Aaron A. Garber

Aaron A. Garber #36099

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EXHIBIT A

OWNER-GALLERY CONSIGNMENT AGREEMENT

OWNER:

Gordon Burr and Kaja Sceery-Burr
26 Columbine Place
Castle Rock, Colorado 80108
Phone: 720-219-5980

THE GALLERY:

Masters Gallery
2616 E 3rd Avenue
Denver, Colorado 80206
Phone: 303-221-2449

hereby enter into the following Agreement:

- 1. Agency; Purposes.** The Owner appoints The Gallery as agent for the works of art ("the Artworks") consigned under this Agreement, for the purposes of exhibition and sale. The Gallery shall not permit the Artworks to be used for any other purposes without the written consent of the Owner. This agreement applies only to works consigned under this Agreement and does not make The Gallery a general agent for any other works.
- 2. Exclusive Representation.** The Owner hereby appoints The Gallery as their sole representative to sell or otherwise make available for acquisition to the public, the Owner's Artworks.
- 3. Consignment.** The Owner hereby consigns to The Gallery, and The Gallery, to the extent it receives physical possession from The Owner, accepts on consignment, those Artworks listed on the attached Inventory Sheet which is a part of this Agreement. Additional Inventory Sheets may be incorporated into this Agreement at such time as both parties agree to the consignment of other works of art. All Inventory Sheets shall be signed by Owner and Gallery.
- 4. Duration of Consignment.** The Owner and The Gallery agree that the initial term of consignment for the Artworks is to be from February 15, 2018 to September 30, 2018, and that the Owner does not intend to request their return before the end of this term. Thereafter, consignment shall continue until the Owner requests the return of any or all of the Artworks or The Gallery requests that the Owner take back any or all of the Artworks with which request the other party shall comply within 30 days.
- 5. Transportation Responsibilities.** Packing and shipping charges, insurance costs, other handling expenses, and risk of loss or damage incurred in the delivery of Artworks from the Owner to The Gallery are the responsibility of the Gallery. Packing and shipping charges, insurance costs, other handling expenses, and risk of loss or damage incurred in the delivery of Artworks from The Gallery to the Owner, shall be the responsibility of The Gallery.

- 6. Responsibility for Loss or Damage, Insurance Coverage.** The Gallery shall be responsible for the safekeeping of all consigned Artworks while they are in its custody. The Gallery shall be strictly liable to the Owner for their loss or damage (except for damage resulting from flaws inherent in the Artworks), to the full amount the Owner would have received from The Gallery if the Artworks had been sold. The Gallery shall provide the Owner with all relevant information about its insurance coverage for the Artworks if the Owner requests this information.
- 7. Fiduciary Responsibilities.** Title to each of the Artworks remains in the Owner until the Owner has been paid the full amount owing him or her hereunder for the piece of Artwork in question; title then passes directly to The Gallery. All proceeds from the sale of the Artworks shall be held in trust for the Owner. The Gallery shall pay all amounts due the Owner before any proceeds of sales can be made available to creditors of The Gallery.
- 8. Removal from Gallery.** The Gallery has indicated that not all of the pieces within the Artworks will be displayed at one time. Additionally, the Gallery has affiliates and other locations, including Gib Singleton Gallery (Vail, Colorado), Galerie Zuger Vail (Vail, Colorado) and Galerie Zuger Santa Fe (Santa Fe, New Mexico), where the Gallery may also exhibit pieces within the Artworks. Other than to other art galleries affiliated with the Gallery or owned by principals of the Gallery, the Gallery shall not lend out, remove from the premises, or sell on approval any of the Artworks, without first obtaining written permission from the Owner.
- 9. Pricing; Gallery's Commission; Terms of Payment.** As the Owner is not an art broker or art dealer, the Owner will be relying heavily on the expertise of the Gallery to help establish the Retail Price of the Artworks specified on the Inventory Sheet. The Gallery shall in good faith make its best efforts to sell the Artworks at or above the Purchase Price or Estimated Market Replacement Price specified on the Inventory Sheet, or make a recommendation to the Owner to adjust the Retail Price. In no event shall the Retail Price be less than 70% of the Purchase Price or Estimated Market Replacement Price. The Gallery and the Owner agree that the Gallery's commission is to be 50% of the Retail Price of the Artwork. Any change in the Retail Price, or in the Gallery's commission, must be agreed to in advance by the Owner and the Gallery. Notwithstanding anything to the contrary contained herein, (i) The Owner represents to The Gallery that at the time of any sale by The Gallery to a third party, The Owner will cause the piece of Artwork sold to be free and clear of all claims and liens, and (ii) all payments due hereunder to The Owner are expressly conditional on The Gallery receiving from Owner upon The Gallery's request (a) satisfactory evidence that all existing liens on the particular piece of Artwork in question have been released, and (b) subject to The Owner's receipt of the requisite payment, a Bill of Sale in favor of The Gallery evidencing that The Owner has good and marketable title, free and clear of all claims, liens, and encumbrances, to such piece. Payment to the Owner shall be made by the Gallery on the 1st of every month following a sale of a piece within the Artworks, and will be net of all commissions due for any/all artworks sold. The Gallery assumes full risk for the failure to pay on the part of any purchaser to whom it has sold an Artwork.

- 10. Termination of Agreement.** Notwithstanding any other provision of this **Agreement**, this **Agreement** may be terminated at any time by either the **Gallery** or the **Owner**, by giving a sixty (60) day written notification of termination from either party to the other. In the event of the **Owner's** death, the estate of the **Owner** shall have the right to terminate the **Agreement**. Within thirty days of the notification of termination, all accounts shall be settled and all unsold **Artworks** shall be returned by **The Gallery**.
- 11. Procedures for Modification.** Amendments to this **Agreement** must be signed by both **Owner** and **Gallery**. Both parties must initial any deletions made on this form and any additional provisions written onto it. Before any such amendments and modifications take effect, the **Owner** will fill a motion seeking approval of the modifications with the Bankruptcy Court and will inform the **Gallery** if the amendments have been approved or denied by the Bankruptcy Court.
- 12. Miscellany.** This **Agreement** represents the entire agreement between the **Owner** and **The Gallery**. If any part of this **Agreement** is held to be illegal, void, or unenforceable for any reason, such holding shall not affect the validity and enforceability of any other part. A waiver of any breach of any of the provisions of this **Agreement** shall not be construed as a continuing waiver of other breaches of the same provision or other provisions hereof. This **Agreement** shall not be assigned, nor shall it inure to the benefit of the successors of **The Gallery**, whether by operation of law or otherwise, without the prior written consent of the **Owner**. In any proceeding to enforce any part of this contract, the aggrieved party shall be entitled to reasonable attorney's fees in addition to any available remedy.
- 13. Choice of Law/Bankruptcy Court Approval.** This **Agreement** shall be governed by the law of the State of Colorado. The parties agree to the exclusive jurisdiction of the United States Bankruptcy Court for the District of Colorado. This **Agreement** is subject to approval of the United States Bankruptcy Court for the District of Colorado.

Length of Contract

From: February 15, 2018 To: September 30, 2018

Consented and agreed to: **Owner**



Gordon Burr

Date: 2-14-2018



Kaja Secery-Burr

Date: 2-14-2018

Consented and agreed to: **The Gallery**



Name: Paul Jung

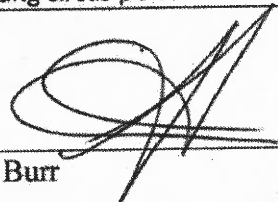
Title: MAN

Date: 2-14-18

Consignment Agreement Artworks List

No.	Title / Description	Artist	Ownership	Purchase Price / Estimated Market Replacement
1.	Jesus in the Garden of Gethsemane	Alvar Suñol Munoz-Ramos	Joint	\$135,000
2.	Entorns II	Alvar Suñol Munoz-Ramos	Joint	\$110,000
3.	Santa Fe Trail	Gib Singleton	Joint	\$110,000
4.	Starry Night	Gib Singleton	Kaja Sceery-Burr	\$24,000
5.	Lincoln	Gib Singleton	Gordon Burr	\$44,000
6.	Balcony scene	Pino Daeni	Joint	\$150,000
7.	Woman playing guitar	Pino Daeni	Joint	\$55,000
8.	Young woman's face	Pino Daeni	Joint	\$28,000
9.	Young circus performer	Nikolai Blokhin	Joint	\$38,000

Owner



Gordon Burr

Date: 2-14-2018



Kaja Sceery-Burr

Date: 2-14-18