

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

R.J. Russell Associates, Inc.,

Debtor(s).

CASE NO.96-22155

R.J. Russell Associates, Inc.,

Plaintiff(s),

A.P. NO.96-2220

vs.

**ReMax Realty Group, Inc., Mary Moffett,
Greater Rochester Association of Realtors, Inc.
Canandaigua National Bank & Trust Co.,**

Defendant(s).

**CORRECTED
DECISION & ORDER**

BACKGROUND

On July 26, 1996, R.J. Russell Associates, Inc. ("Russell Associates") filed a petition initiating a Chapter 11 case. At the time of the filing of its petition, Russell Associates was a New York State licensed real estate broker authorized to conduct a real estate brokerage business in the State of New York. As a licensed real estate broker conducting a real estate brokerage business, Russell Associates was engaged in providing services in connection with the purchase and sale of real estate, primarily residential real estate, leasing, property management and relocation. Russell Associates was also a member of the Greater Rochester Association of Realtors, Inc. (the

“Association”), a not-for-profit corporation composed primarily of: (1) real estate broker members who are licensed to engage in real estate brokerage businesses; and (2) associate members, consisting of licensed real estate sales persons (“Salespersons”) who are authorized to engage in the negotiation for the sale or rental of real estate and other activities in the State of New York under the supervision of a licensed real estate broker. At the time of the filing of its petition, Russell Associates estimated that it was either the listing or selling broker in sixty or more purchase and sale transactions where a Purchase and Sale Contract for a residential property (a “Purchase and Sale Contract”) had been entered into between a buyer and a seller prior to the date of the filing of the petition but a closing was not scheduled to occur until after the filing of the petition.

Because it appears that during the last twenty years there has not been a bankruptcy filing in the Western District of New York by a licensed real estate broker with a substantial number of pending transactions at the time of filing, brokers, Salespersons, buyers, sellers, their respective attorneys, and other interested parties, including Canandaigua National Bank & Trust Company (“Canandaigua National”), which holds a perfected security interest in all of the assets of Russell Associates, were unsure of all their rights and obligations with respect to any commissions which Russell Associates might receive or be entitled to receive. Funds to pay commissions were being held by various parties from closings which had already taken place, including some prepetition closings, and there was uncertainty as to what was to be done with commissions which would be payable as closings took place post-petition.

In order to obtain a determination from the Court of the respective rights, and perhaps remedies, of those interested parties as soon as possible, on August 1, 1996 Russell Associates

commenced an Adversary Proceeding (the “Adversary Proceeding”) against: (1) Canandaigua National; (2) the Association, as an entity which Russell Associates perceived to have an interest in the resolution of the overall rights and remedies of the various parties, but an entity which was not a party to any of the Purchase and Sale Contracts; (3) ReMax Realty Group, Inc. (“ReMax”), another licensed real estate broker, as a representative of other similarly situated real estate brokers which might be parties to one or more of the Purchase and Sale Contracts as either a listing or selling broker; and (4) Mary Moffett, a licensed real estate Salesperson who pre-petition had a working agreement with Russell Associates as a licensed broker (a “Russell Associates Salesperson”), and who claimed to be entitled to commissions in connection with one or more of the Purchase and Sales Contracts, as a representative Russell Associates Salesperson.

The Russell Associates complaint in the Adversary Proceeding alleged that: (1) Russell Associates had filed a Chapter 11 proceeding for the purpose of obtaining Bankruptcy Court supervision of the liquidation of its business and to ensure that all of those having claims against it and its property would be treated fairly, have their claims, interests, and relative priorities thereof determined by a Court according to law and in a fair and equitable manner; (2) Russell Associates had earned as much as \$1,200,000.00 in unpaid commissions, either as a listing or selling broker, in connection with the transactions covered by the Purchase and Sale Contracts; (3) Russell Associates had entered into various agreements with Russell Associates Salespersons, who were independent contractors, which provided for them to be paid commissions; (4) to the extent that the Russell Associates Salespersons had been involved in Purchase and Sale Contracts entered into within ninety days before the filing of the petition, those Salespersons might have an allowed priority

claim of up to \$4,000.00, pursuant to Section 507(a)(3)(B), by reason of commissions earned and received by Russell Associates on those Purchase and Sales Contracts; (5) attorneys for the Association, Moffett, other brokers and other Russell Associates Salespersons have suggested to the attorneys for Russell Associates that the Purchase and Sale Contracts are executory contracts, within the meaning and intent of Section 365, which Russell Associates disputes; and (6) although no representative buyer was named as a defendant in the Adversary Proceeding, some buyers under Purchase and Sales Contracts had made deposits to be held by Russell Associates as the listing or selling broker, which buyers might be entitled to an allowed priority claim of up to \$1,800.00 for that deposit, pursuant to Section 507(a)(6), but only in the event that the particular Purchase and Sale Contract did not close.

The Complaint in the Adversary Proceeding requested that the Court determine the relative rights, interests and priorities in the commissions earned by Russell Associates.

On August 5, 1996, the Court entered an Order which: (1) reduced the time for the defendants to answer the Complaint in the Adversary Proceeding; and (2) scheduled a pretrial status conference in the Adversary Proceeding for August 19, 1996, which advised the parties that the Court expected them to be prepared to discuss in detail the law which they believed would be applicable to support any rights and remedies they might assert with respect to commissions earned and paid or payable to Russell Associates.

By the time of this Decision & Order the Association had not interposed an Answer in the Adversary Proceeding having been granted an indefinite extension of time to answer and ReMax had interposed a general denial. Canandaigua National interposed an Answer which alleged that: (1) as

of August 14, 1996 Russell Associates owed Canandaigua National \$142,779.18, secured by a perfected security interest in all of the personal property of Russell Associates including, but not limited to, all accounts, inventory, general intangibles, chattel paper, documents of title, and instruments now owned or thereafter acquired, and all proceeds thereof; (2) Canandaigua National's interest as a perfected secured creditor in the earned commissions of Russell Associates as the listing broker in connection with any of the Purchase and Sale Contracts was superior to any claims which could be asserted by either co-brokers or Salespersons; and (3) Canandaigua National's interest as a perfected secured creditor in any earned commissions of Russell Associates as the selling broker in connection with any of the Purchase and Sale Contracts was superior to any claims which could be asserted by any co-brokers or Russell Associates Salespersons.

Moffett interposed an Answer which included, as Exhibit "A", a copy of a Greater Rochester Association of Realtors, Inc. Exclusive Right to Sell Contract (a "Listing Contract") and, as Exhibit B, a copy of a March 12, 1996 agreement entered into between Russell Associates and William Heagney, (as an "Independent Contractor/Salesperson"), as a representative agreement entered into between Russell Associates, as a licensed real estate broker, and its licensed Salespersons, as an independent contractor (a "Russell Salesperson Agreement").¹ Moffett's Answer asserted that: (1) in a transaction where Russell Associates is the listing broker and Moffett is the Russell Associates Salesperson, in order for her to earn a commission, she is required to: (a) obtain a ready, willing and able buyer; and (b) complete any necessary closing arrangements including, but not limited to,

¹ At a hearing conducted on August 29, 1996, it was represented to the Court that the form used for all of the Russell Salespersons Agreements was the same form.

arrangements for the signing of the Purchase and Sale Contract, arranging an engineer's inspection, arranging for repairs to be completed, arranging for a mortgage appraisal and approval, setting up and attending a final walk-through, and changing utilities ("Post-Contract Activities"); and (2) under her Russell Associates Salesperson Agreement, Russell Associates is required to pay Moffett the commissions provided for after it has collected the commissions from the seller where Russell Associates is the listing broker, or from a co-broker, where Russell Associates is a selling broker. Moffett's Answer also included three counterclaims, as follows: (1) pursuant to the provisions of the Listing Contract and the Russell Salespersons Agreement, Moffett's share of any commissions earned on the transactions in question are not property of Russell Associates or the Russell Associates bankruptcy estate under Section 541; (2) the Listing Contract and the Purchase and Sale Contract are executory contracts under Section 365, which must be assumed by Russell Associates, and when assumed must be assumed in whole and not in part, since they constitute a unitary contract; (3) in connection with a Listing Contract and/or Purchase and Sale Contract assumed by Russell Associates pursuant to Section 365, Moffett, or the respective Russell Associates Salesperson, must receive their share of any commissions earned and ultimately paid to Russell Associates because the Russell Salesperson Agreements are also part of the unitary contract comprised of the Listing Contract and the Purchase and Sale Contract; (4) in connection with the Vern Countryman test for determining whether contracts are executory, substantial performance remains due on both sides under the Listing and Purchase and Sales Contracts, which make them executory, and which requires Russell Associates to assume them under Section 365.

On August 16, 1996, the attorneys for Moffett filed a Memorandum of Law (the "Moffett Memorandum") in support of Moffett's assertions in their counterclaims that: (1) Salespersons shares of any earned commissions are not property of a debtor's estate; (2) the Purchase and Sale Contract, Listing Contract and Russell Sales Person Agreements for each respective transaction constitute a unitary contract under New York law; (3) this unitary contract is an executory contract which Russell Associates is required to assume under Section 365, with Court approval; and (4) once this unitary contract is assumed, the bankruptcy estate of Russell Associates would be required to pay an amount representing all earned commissions on that transaction to any co-broker and Russell Associates Salespersons, whose rights to payment would be superior to that of Canandaigua National and the other unsecured creditors of Russell Associates.

On August 9, 1996, at a preliminary hearing Russell Associates requested to be authorized under Section 363 to use cash collateral in which Canandaigua National had an interest, on August 19, 1996, at the pretrial conference conducted by the Court in connection with the Adversary Proceeding, and on August 21, 1996, the return date of various motions brought on by Russell Associates for the turnover of various commissions being held by attorneys for sellers and co-brokers in connection with Purchase and Sale Contracts which had closed, the Court generally discussed with the interested parties present and their attorneys various legal positions regarding earned commissions. At the August 19, 1996 pretrial conference the Court: (1) adjourned the conference to August 29, 1996, a Chapter 11 calendar day; (2) instructed the parties to make any further submissions they wished to make in connection with the Moffett executory contracts counterclaim before August 29, 1996; and (3) indicated that the Court would make a ruling on August 29, 1996

with respect to the Moffett executory contract counterclaim. On August 27, 1996, the attorneys for Russell Associates filed a Memorandum of Law with respect to the executory contract counter- claim (the “Russell Associates Memorandum”), and on the same day Moffett filed an affidavit regarding the counterclaim (the “Moffett Affidavit”).

On August 29, 1996, the Court received a letter from the attorney for the Association which included a copy of a document entitled, “Recommended Guidelines for Real Estate Agents and Attorneys from Initial Contract/Listing to Transfer of Title in a Real Estate Transaction”, which the attorney for the Association advised the Court were guidelines developed through a joint and cooperative effort of the Association and Monroe County Bar Association.

On August 29, 1996, the Court heard oral argument in connection with the Moffett executory contract counterclaim from the attorney for Russell Associates, the attorneys for Moffett, who also represent a recently appointed committee consisting of Brokers and Salespersons, the attorney for ReMax, the attorney for the Association, and various Russell Associates Salespersons.

In addition, on August 28, 1996, the Court received a letter from the attorney for the recently appointed committee consisting of unsecured creditors other than the Brokers and Salespersons, who indicated that that committee supported the position of Russell Associates that the contracts in questions were not executory contracts which were required or permitted to be assumed by Russell Associates pursuant to Section 365.

DISCUSSION

After carefully reviewing and analyzing the Listing Contract, Purchase and Sale Contract and sell Salesperson Agreement, and drawing on my personal experience as a several-time home buyer and attorney who for a time worked in the real estate department of a medium-size law firm, the following is my understanding of a typical residential real estate purchase and sales transaction in the greater Rochester area. A seller goes to a licensed real estate broker's office and enters into a Listing Contract with that real estate broker (the "Listing Broker"). The seller may have gone to that Listing Broker because of a particular Salesperson who works out of that Broker's office, because of a past real estate transaction, because of a referral from an attorney, accountant, friend or neighbor, or for a variety of other reasons. In the Listing Contract the seller agrees to pay the Listing Broker's office a negotiated "commission", generally 6% of the ultimate selling price in the greater Rochester area, which is earned according to the Listing Contract, "when I am provided with a written purchase offer which meets the price and other conditions I have set or when the Purchase and Sale Contract becomes a binding legal commitment on the buyer". The Listing Contract also states that, "[a]t the closing of the sale of the property, my representative (such as my attorney) is authorized to pay the Realtor (the Listing Broker) the commission agreed to in paragraph 4 from the proceeds of the sale of the property". In addition, in the Listing Contract the seller authorizes the Listing Broker "to cooperate with other brokers including, brokers who represent buyers . . . [t]o appoint subagents, and to divide with other licensed brokers such compensation in any manner acceptable. I understand and agree that if the commission provided for in paragraph 4 is divided, it will be divided as follows" (customarily 3% to the listing office and 3% to a selling broker's office in the greater Rochester area).

Once the Listing Contract is entered into, the property is multiple-listed through the Association, and ultimately when a buyer is obtained, the buyer and seller enter into a Purchase and Sale Contract. The Purchase and Sale Contract generally provides for a deposit (the “Deposit”) to be made with the Listing Broker, “which is to become part of the purchase price or returned if [the sale is] not completed or if Buyer’s contract thereafter fails to close for any reason not the fault of the Buyer.” The Purchase Contract also generally identifies the Selling Broker’s office by stating that, “the parties agreed that _____ brought about this purchase and sale”, and this blank is filled in with the selling broker’s name (the “Selling Broker”). A portion of the Purchase and Sale Contract, labeled as Administrative Information, sets out detailed information regarding the buyer, seller, the attorney for the buyer and seller, selling broker, listing broker, selling agent (Salesperson), and listing agent (Salesperson).

Recently, more and more Purchase and Sale Contracts have been made contingent upon engineering inspections, radon inspections, and carbon-monoxide inspections, in addition to such traditional contingencies as the buyer needing to sell its current residence or obtain a mortgage from a financial institution.

In addition, at the time the Purchase and Sale Contract is entered into the buyer, seller, listing Salesperson and selling Salespersons enter into a Disclosure Regarding a Real Estate Agency Relationship (the “Disclosure Statement”).

Typically, after the Purchase and Sale Contract is entered into, copies are forwarded to the attorneys for the buyer and seller, various contingencies are worked on by the parties, Salespersons, and attorneys, and if and when all contingencies are removed or waived, a closing is scheduled,

typically with the attorney for the lending institution from which the buyer is obtaining a mortgage.

At the time of closing, if the Deposit is not sufficient to cover the entire commission agreed to be paid to the Listing Broker in the Listing Contract, the Listing Broker, in accordance with the authorization contained in the Listing Contract, generally forwards a statement for the balance of any commission due to the attorney for the seller. At the time of closing the attorney for the seller will then see that this amount is paid to the Listing Broker from the proceeds of sale so that his client, the seller, will have fulfilled his obligations under the Listing Agreement. The Court has been advised, however, that in some real estate transactions in the greater Rochester area, the attorney for the seller may receive two statements, a statement from the Listing Broker for the balance of its divided commission (typically 3% less the Deposit), and a statement from the Selling Broker for its typically 3%. Although there is nothing in the Listing Contract or the Purchase and Sale Contract which provides for this, and the Court has not been made aware of any other written agreement regarding commissions entered into directly between the actual Listing and Selling Brokers to a transaction, or between the Selling Brokers and the Buyer or Seller, some attorneys honor these separate billing statements (presumably because the Listing Broker has acknowledged this division of commission and waived its right to receive the full commission as provided for in the Listing Contract once it sent the statement to the seller's attorney for less than the commission provided for in the Listing Contract). Once earned commissions are received by a Broker after the closing, whether the Broker was the Listing or Selling Broker to the transaction, that Broker then pays to any Salespersons in its office who worked on the transaction an amount computed in accordance with

the Broker's agreement with that Salesperson. The Russell Salesperson Agreement incorporates a sliding scale of commissions to which a Russell Associates Salesperson may be entitled in connection with a listing or sale which appears to run from a low of 27% of the Russell Associates share of a commission earned and paid to a high of 70%.

I. Are the Russell Salesperson Agreements, Prepetition Listing Contracts Where Russell Associates is the Listing Broker, or Prepetition Purchase and Sale Contracts Where Russell Associates is the Listing or Selling Broker Executory Contracts Which Russell Associates May or Must Assume Under Section 365?

A. The Russell Salespersons Agreements

Russell Associates has advised the Court that all of the Russell Salesperson Agreements were terminated by Russell Associates pre-petition in accordance with the provisions of those agreements. The representative Russell Salesperson Agreement which the Court has been reviewed does not contain a specific provision regarding termination which would have imposed any requirements on Russell Associates before it was able to terminate the agreement.

Therefore, the Russell Salesperson Agreements, which were terminated prepetition, are not executory contracts within the meaning of Section 365 which the debtor can or must assume. To the extent that any Russell Associates Salesperson has a claim against Russell Associates for the termination of their agreement, or has a claim against Russell Associates for earned commissions pursuant to the provisions of such a terminated Agreement, that claim is a prepetition claim.

B. Purchase and Sale Contracts

Section 365(a) provides that:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

The Purchase and Sale Contracts are contracts entered into between the buyer and the seller of the real estate covered by the Contract. No Listing or Selling Broker is a party to that Contract. Therefore, since Russell Associates is not a party to any Purchase and Sale Contract, these Contracts are not Contracts of the debtor and are not executory contracts which the debtor can assume or reject under Section 365(a).²

Furthermore, no buyer or seller to any Purchase and Sale Contract where Russell Associates is a Listing or Selling Broker has moved the Court, pursuant to Section 365(d)(2), asserting that its Purchase and Sale Contract is an executory contract which Russell Associates must assume or reject within a time specified by the Court³. That may be in part because: (1) buyers and sellers are unconcerned about who may ultimately receive the commissions payable at a closing, since buyers are not obligated to pay a commission under the standard Purchase and Sale Contract (although they may have a separate agreement not at issue before the Court) and a sellers only obligation to pay real

² Russell Associates may have an obligation as an agent for a seller to return a deposit to a buyer under some circumstances if the closing fails to take place.

³ Section 365(d)(2) provides:

In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

estate commissions is to pay the Listing Broker the commission set forth in the Listing Contract; and (2) neither the Listing Contract nor the Purchase and Sale Contract require Russell Associates, as the Listing or Selling Broker, to perform any specific services once the Purchase and Sale Contract is executed.

C. Listing Contracts

Under the Listing Contracts to which Russell Associates is a party, Russell Associates has earned its agreed upon commission when it provides the seller with a written purchase offer which meets the price and other conditions the seller has set or when the Purchase and Sale Contract becomes a binding legal commitment on the buyer. The representative Listing Contract which the Court has reviewed does not set forth any further duties or require any further performance by the Listing Broker once that provision has been met.

Therefore, once a Purchase and Sale Contract has been entered into by a buyer and a seller where Russell Associates is the Listing Broker, no further performance by Russell Associates appears to be required under the Listing Contract in order for Russell Associates to be paid its commission. Numerous courts and what I believe is the better authority, have held this in their determinations that such Listing Contracts are not executory contracts once a ready, willing and able buyer has been procured and a Purchase and Sale Contract executed.⁴

⁴ In evaluating the Listing Contracts on the basis of being executory, the focus is on the fact that all the performance necessary to earn a commission had been completed once the Purchase and Sale Contract was signed. Moreover, it is critical to note that at the point of signing the Purchase and Sale Contract, Russell Associates was not *required* to perform any further services in order to earn its commission. *In re Munple, Ltd.* 868F.2d 1129 (9th Cir. 1989) (emphasis in original); *In re Moskovic*, 77 B.R. 421 (Bankr. S.D.N.Y. 1987)(Schwartzberg, J.).

D. Services Customarily Performed by Listing and Selling Salespersons After the Execution of a Purchase and Sale Contract

The Court has received numerous letters from Russell Associates Salespersons asserting that the Salesperson's job really begins once the Purchase and Sale Contract is entered into. Set forth in great detail in the Moffett Affidavit are numerous examples of Post-Contract Activities often performed by Salespersons. They include: working to facilitate the removal of various inspection contingencies; doing final walk-throughs; working with mortgage brokers and financial institutions to facilitate buyers obtaining mortgage financing; negotiating personal property disputes; and generally working to ensure that the closings take place.

Russell Associates Salespersons in their letters to the Court have indicated that, notwithstanding the uncertainty as to what portion of their earned commissions they may receive as a result of the Russell Associates bankruptcy, they have continued to work with the buyers and sellers and to perform many of these Post-Contract Activities under the prepetition Purchase and Sale Contracts where Russell Associates is either the Listing or Selling Broker.

To me, this is a perfect example of the fact that bankruptcies often expose the worst in some people, and bring out the best in others. Russell Associates Salespersons, Co-Brokers, and Salespersons for Co-Brokers who have post-petition performed services to facilitate the closing of the Purchase and Sale Contracts where Russell Associates was either a Listing or Selling Broker, are to be applauded for their efforts to insure that the sellers and buyers, the truly innocent parties, have their transactions closed.

However: (1) Russell Associates has not required or requested that any of these Brokers or Salespersons perform these services, and the Russell Associates attorneys have represented to the Court that the failure of any Brokers or Salespersons to perform these Post-Contract Activities will not impact on Russell Associates legal entitlement to earned commissions on the Purchase and Sale Contracts; (2) as “professionals”, licensed Salespersons and Brokers have certain obligations to act as professionals, notwithstanding monetary compensation; and (3) there is life for all of the Russell Associates Salespersons, as well as Co-Brokers and Salespersons for Co-Brokers, after the Russell Associates bankruptcy proceeding. In connection with that life after the Russell Associates bankruptcy proceeding, each of these Salespersons and Co-Brokers have the incentive to maintain their personal, business and professional reputations in the community, to ensure their future livelihood.

As to these often performed Post-Contract Activities, in *In re Munple, Ltd.*, 868 F.2d 1129 (9th Cir. 1989), the Court made what I consider to be a very important distinction. The Court discussed that, although Brokers and Salespersons may have the authority and the incentive to render further services after the Purchase and Sale Contract is signed, the critical question is whether they are required to perform such services in order to earn a commission. The Ninth Circuit Court of Appeals panel in that case concluded that nothing in the original representation agreement or the purchase agreement suggested such an obligation. In the Russell Associates case there is nothing that I could find in the Listing Contract, Purchase and Sales Contract or Russell Salespersons Agreement which requires any Broker or Salesperson to perform these often performed Post-Contract Activities in order to earn a commission. Therefore, under either a “functional” or

“substantial performance” theory of executory contracts, as are outlined in detail in the Moffett Memorandum, the Listing Contracts and Purchase and Sales Contracts are not executory contracts because of these often performed activities, since these activities are not legally required for the Listing or Selling Brokers to earn a commission.

E. Unitary Contracts

Moffett has asserted that the Listing Contract, Purchase and Sale Contract and Russell Salesperson Agreement for any Russell Associates Salesperson who worked on a specific transaction should be construed as one agreement under the unitary contract doctrine which may be applied to contracts relating to the same subject matter executed simultaneously by the same parties. *See Williams v. Mobil Oil Corp.*, 83 A.D.2d 434, 439-40 (2d Dept. 1981). Theoretically, the application of this doctrine could bring these Contracts into an executory, assumable posture if one or more of the Contracts was found to be executory. Because, for the reasons stated above, the Court has found that none of the three Contracts when analyzed individually are executory, it is not necessary to make a determination as to the application of the unitary contract doctrine.

II. Fundamental Fairness

It was asserted at oral argument on August 29, 1996, that the Court should find that for any given transaction the Listing Contract, Purchase and Sale Contract and respective Russell Salesperson Agreement, were part of a unitary contract which must be assumed by Russell Associates, which would result in all Co-Brokers and Salespersons receiving their respective commissions, because it would be fundamentally fair for that to happen. The principal reasons asserted for that fair result were that: (1) the Co-Brokers and Salespersons really generated the

commissions, not Russell Associates; (2) at least the Salespersons really depend on their commissions to support their families; (3) unlike other general creditors, such as the telephone companies, utility companies, Gannett publications, and other general trade creditors, the Co-Brokers and Salespersons did not assume any business risk in working for or with Russell Associates that Russell Associates would go bankrupt and not pay their commissions.

The Bankruptcy Code and the Rules of Bankruptcy Procedure, along with any applicable Federal and State laws, provide a framework for the liquidation or rehabilitation of a business such as Russell Associates. There is no question that the Bankruptcy Court is a court of equity, however, it is also a court which must carefully enforce applicable law and cannot ignore the law in making its decisions.

Fundamental fairness is something which is constantly stressed in the Rochester Division of the Bankruptcy Court for the Western District of New York. However, fundamental fairness includes insuring that the rights of all interested parties in a bankruptcy proceeding are fairly determined and enforced. A significant element of fundamental fairness in the bankruptcy system is to insure that the law is consistently determined and applied, so that parties can act with predictability in their future dealings.

In Bankruptcy Court, as in other courts, contractual relationships are highly scrutinized and sometimes exposed for what they are not. As a result parties' rights, especially with respect to third parties, are often found and exposed to be different than what the parties thought or intended them to be. That is because there are often gaps in the parties contractual documents, failures to include certain provisions, or failures to take advantage of various opportunities to perfect rights against third

parties. Unfortunately, a Bankruptcy Court cannot fill in these gaps, add omitted provisions, or ignore opportunities that were not seized.

In addition, Bankruptcy Court determinations often expose business risks that parties took, even if those parties were not fully aware of those business risks.

One of the arguments made on behalf of Moffett was that the functional approach rather than the substantial performance approach should be employed by the Court to determine whether the Contracts at issue were executory contracts because the substantial performance standard is vague, and often Courts use it to back into a result. I believe that for me to ignore the law and find that the Contracts in question are executory contracts, or that they fall under the unitary contract doctrine, would simply be backing into a result that would certainly benefit some creditors of Russell Associates, but not necessarily all of its creditors. Whether Co-Brokers and agents have greater rights to all or a portion of the commissions to which Russell Associates may be entitled has still not been finally resolved by this Court, but it will be resolved in future proceedings, including those set forth below. When that happens, it may be that the fundamental fairness that the Co-Brokers and Salespersons believe is such an obvious result in this case, will occur. But fundamental fairness will not be served by finding the Contracts in question to be executory.

I feel for the hardships that the Salespersons have incurred as the result of this bankruptcy. But in this Court, the words of District Judge Michael A. Telesca, spoken at my swearing in ceremony, are experienced by me everyday. "In your Court everyone who comes before you is experiencing a hardship. You must never forget that, and you must never be insensitive to their hardship".

III. Future Proceedings

Canandaigua National has filed a Motion for Summary Judgment in the Adversary Proceeding which is returnable on September 4, 1996. In connection with the Canandaigua National Motion for Summary Judgment, the Court expects that it will determine: (1) the assertion in Moffett's Counterclaim that amounts received by Russell Associates as commissions where it was a Listing or Selling Broker are not property of the estate under Section 541 to the extent Russell Associates is required to pay an amount to a Russell Associates Salespersons as their share of the commissions; (2) whether Canandaigua National's perfected security interest in the assets of Russell Associates gives it a right to commissions earned by Russell Associates until which is superior to the rights of any Russell Associates Salespersons, Co-Brokers, or Co-Brokers' Salespersons, where Russell Associates was the Listing Broker, and superior to the rights of any Co-Broker or Russell Associates Salespersons, where Russell Associates was the Selling Broker; and (3) whether Russell Associates Salespersons or Co-Brokers have a right superior to other general unsecured creditors of Russell Associates (except for any Section 507(a)(3)(B) priority Russell Associates Salespersons may have) in commissions earned by Russell Associates.

CONCLUSION

Neither the Russell Salespersons Agreements, which were terminated prepetition, any prepetition Listing Contracts where Purchase and Sale Contracts were entered into pre-petition, and which closed or will close post-petition, or any Purchase and Sale Contracts where Russell

Associates was either the Listing or Selling Broker, which were entered into prepetition and closed or will close post-petition, are or were executory contracts which Russell Associates, as debtor and debtor-in-possession, must or may assume pursuant to Section 365(a).

This Adversary Proceeding is adjourned to September 4, 1996, at the return of the motion by Canandaigua National Bank & Trust Company for Summary Judgment.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: August 30, 1996