

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
www.flsb.uscourts.gov

In re:

CHAPTER 11

PALM BEACH FINANCE PARTNERS, L.P.,
PALM BEACH FINANCE II, L.P.,

Case No. 09-36379-PGH
Case No. 09-36396-PGH
(Jointly Administered)

Debtors.

**LIQUIDATING TRUSTEE'S AMENDED¹ MOTION FOR
ENTRY OF ORDER ESTABLISHING UNIFORM MEDIATION
PROCEDURES FOR ADVERSARY PROCEEDINGS**

Barry E. Mukamal, in his capacity as liquidating trustee ("*Liquidating Trustee*") for the Palm Beach Finance Partners Liquidating Trust and the Palm Beach Finance Partners II Liquidating Trust (collectively, the "*Palm Beach Liquidating Trusts*"), by and through undersigned counsel, files this Amended Motion for Entry of Order Establishing Uniform Mediation Procedures Governing the Adversary Proceedings (the "*Amended Motion*"), and respectfully represents as follows:

I. Background

1. On February 16, 2012, the Liquidating Trustee filed with this Court a motion [ECF. No. 1096, re-docketed as ECF No. 1103] (the "*Mediation Procedures Motion*") requesting that the Court establish certain uniform procedures to govern the mediations expected to occur in connection with the Liquidating Trustee's 144 adversary proceedings against various third parties ("*Adversary Proceedings*"), and in accordance with this Court's Pretrial Order in

¹Amends ECF No. 1103, to reflect certain changes to the proposed uniform mediation procedures.

effect in each of the Adversary Proceedings. The Mediation Procedures Motion is currently set for hearing on March 20, 2012 at 9:30 a.m.

2. In recent communications with the proposed Mediators² identified in the Mediation Procedures Motion, certain additional procedures have been requested by the Mediators that the Liquidating Trustee agrees should be added to the proposed mediation procedures in order to effectuate the mediation provisions of the Court's Pretrial Order and ensure an orderly administrative process. As such, the Liquidating Trustee is filing this Amended Motion to seek approval of the Amended Mediation Procedures, as outlined in detail below.³

II. Relief Requested and Basis Thereof

3. By this Amended Motion, the Liquidating Trustee requests that this Court enter an Order, pursuant to Local Rule 9019-2(B)(1), implementing the mediation procedures set forth below for the Adversary Proceedings ("**Amended Mediation Procedures**"). The Liquidating Trustee requests that the Amended Mediation Procedures be entered to effectuate the mediation provisions of the Court's Pretrial Order and ensure an orderly process.

4. Specifically, the Liquidating Trustee proposes the following Amended Mediation Procedures:

- a. Mediator Selection. The Liquidating Trustee requests that the following three pre-selected mediators be appointed to mediate the Adversary Proceedings (referred to each as a "**Mediator**" and collectively as, the "**Mediators**"): Frances Carter, Esq., John

² Capitalized terms utilized but not otherwise defined herein shall have the meaning ascribed to such terms in the Mediation Procedures Motion.

³ In addition, contemporaneously herewith, the Liquidating Trustee has filed an *ex parte* motion to continue the hearing currently set for March 20, 2012 to consider the Mediation Procedures Motion in order to give all parties an adequate opportunity to review and consider the proposed mediation procedures, as amended.

Freud, Esq. and James Gilbert, Esq. Messrs. Freud and Carter are located in Miami, Florida while Mr. Gilbert is located in Minneapolis, Minnesota. Attached as Exhibit 1 is description of the professional background for each of the Mediators. Each of the Mediators has extensive experience in mediating commercial disputes. The parties in the Adversary Proceedings will jointly select the Mediator from the above list of Court-approved Mediators for each mediation conference (“*Mediation Conference*”). In the interests of efficiency, the Liquidating Trustee simply wishes to avoid incurring substantial time addressing mediator selection with a multitude of Defendants. The Liquidating Trustee suggests that based on the reputations and backgrounds of the Mediators, at least one of the three mediators should be acceptable to each Defendant.⁴ Of course, the Liquidating Trustee requests that nothing prevent him and any particular Defendant from mutually agreeing to use an alternative mediator.

b. Time of Mediation Conference. On or before the later of (i) 30 days from the date of the order granting this motion or (ii) 60 days from the date of service of a particular summons and complaint, each Defendant shall provide the Liquidating Trustee with three proposed dates on which it is available to mediate.

c. Attendance at Mediation Conference. The Pretrial Order requires that each party to the Mediation Conference (referred to each as “*Party*” and collectively as, the “*Parties*”) shall participate in the Mediation Conference in good faith and shall ensure that a representative is present at the Mediation Conference. The Liquidating Trustee requests that telephonic appearances not be permitted, unless otherwise agreed to by the parties and the Mediator. By identifying a Minnesota based mediator, the Liquidating

⁴ The term “*Defendants*” collectively refers to any and all defendants in the Adversary Proceedings.

Trustee is willing to attend a number of mediations in Minnesota provided that multiple mediations are able to be scheduled consecutively. However, given the potential volume of mediations, as well as the unique mechanics of the confirmed Plan of Liquidation, the Liquidating Trustee requests that at his discretion, the Trust Monitor be permitted to attend Mediation Conferences as the representative of the Liquidating Trustee (counsel to the Liquidating Trustee will attend all Mediation Conferences).

d. Fees. The Parties will be responsible for an equal and pro rata share of the total amount of the Mediator's fees and costs. The Mediators have each agreed to charge an hourly rate of \$400 in connection with the Adversary Proceedings. The Liquidating Trustee requests that he be authorized to pay all of the fees and costs of a Mediator after review of the Mediator's bill without further order of the Court. The Liquidating Trustee shall be entitled to seek reimbursement from the Defendant for its proportionate share of the Mediator's fees and costs and such Defendant shall have ten (10) days following receipt of the Liquidating Trustee's request for reimbursement to submit payment in full to the Liquidating Trustee.

e. Cancellation. If a scheduled mediation is cancelled any less than ten (10) days prior to the scheduled mediation date, the Mediator shall be entitled to a cancellation fee equal to \$800 (or the equivalent of two (2) hours at the Mediator's agreed billing rate).

5. The Liquidating Trustee seeks approval of the Amended Mediation Procedures pursuant to §§ 105(a) and (d) of the Bankruptcy Code and Bankruptcy Rule 7016. Section 105(a) authorizes the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Chapter 11]," and § 105(d) authorizes the Court to

issue orders “necessary to further the expeditious and economic resolution of [a] case.” 11 U.S.C §§ 105(a) and (d). Additionally, Bankruptcy Rule 7016 authorizes the Court to implement pretrial procedures designed to reduce costs and promote the prompt resolution and settlement of litigation. Fed. R. Bankr. P. 7016(b)(3)(B).

6. The Amended Mediation Procedures will (i) streamline the resolution of the Adversary Proceedings without prejudice to the Defendants, (ii) facilitate the prompt and cost-effective resolution of the Adversary Proceedings, (iii) minimize the Court’s administrative burden, and (iv) maximize the recovery of funds for the benefit of the Palm Beach Liquidating Trusts and their respective creditors. For instance, limiting the number of mediators assigned to the Adversary Proceedings will (i) minimize the time and expense of reviewing with the Defendants the entire register of mediators, and (ii) ensure that the Mediators develop an institutional understanding of the facts and issues common to all of the Adversary Proceedings. Accordingly, the Liquidating Trustee believes approval of the relief requested herein is in the best interests of the Palm Beach Liquidating Trusts, their respective creditors, and all interested Parties.

7. As with the original Mediation Procedures Motion, the Liquidating Trustee is not filing copies of this Amended Motion in each Adversary Proceeding. Rather, as to any Defendant that has previously been properly served in their respective Adversary Proceeding, the Liquidating Trustee will serve a copy of this Amended Motion (and notice of the hearing set thereon) on such Defendant and/or their counsel. As to all Defendants for which the Liquidating Trustee believes that service of process has not yet been accomplished in the respective Adversary Proceeding, the Liquidating Trustee proposes to serve a copy of any order on the

Amended Motion along with any complaint, summons and pretrial order filed in the respective Adversary Proceeding, once an appropriate address for service of process has been obtained.

8. Notably, the Amended Mediation Procedures are similar although not identical to procedures adopted in other significant Chapter 11 cases in this District. *See, e.g., In re Mercedes Homes, Inc. et al.*, Case No. 09-11191-BKC-PGH (Bankr. S.D. Fla. January 12, 2011) [ECF No. 2175].

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter an Order (similar in form to the Order attached hereto as Exhibit 2) (i) granting this Motion; and (ii) granting such further relief this Court deems just and proper.

Dated: March 15, 2012.

s/ Michael S. Budwick
Michael S. Budwick, Esquire
Florida Bar No. 938777
mbudwick@melandrussin.com
Joshua A. Marcus, Esquire
Fla. Bar No. 92857
jmarcus@melandrussin.com
MELAND RUSSIN & BUDWICK, P.A.
3000 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-6363
Telecopy: (305) 358-1221

*Attorneys for Barry E. Mukamal,
Liquidating Trustee*

Francis L. Carter

Of Counsel - Bankruptcy

Phone: (305) 856-2444

E-mail: flc@katzbarron.com

Fax: (305) 285-9227

Francis Carter is of counsel and heads the Bankruptcy and Creditors' Rights law practice in the Miami office of Katz Barron Squitiero Faust. He has practiced in the insolvency field in South Florida for more than 35 years, and has appeared in numerous real estate and other business reorganization cases and receivership cases, representing borrowers, mortgage lenders, real estate owners and developers, landlords, and purchasers of distressed real estate and other assets, as well as individual principals and guarantors of business debtors. These cases have included retail, office, warehouse, hotel, subdivision, multi-family and marina properties; as well as financial, industrial, commercial, manufacturing, retail, medical, hospitality and other businesses, both domestic and international.

Mr. Carter has also served as a mediator in hundreds of bankruptcy and other civil business cases, involving voidable preferences, fraudulent transfers, ponzi scheme clawbacks, foreclosures, deficiency claims, guaranties, contract disputes, directors and officers liability claims, business dissolutions, tax claims and other commercial and financial legal issues.

Mr. Carter is a Fellow of the American College of Bankruptcy and has been listed in The Best Lawyers in America under Bankruptcy and Debtor-Creditor Rights Law since 1991. The 2011 Edition of Chambers USA: America's Leading Lawyers for Business ranks Mr. Carter as a Senior Statesman, and further describes him as, "immensely experienced ... one of the Dean's of Florida's bankruptcy bar ... strategically excellent and ... renowned as one of the state's finest mediators." He is also listed as a Top Lawyer in the South Florida Legal Guide and in Florida Trend's Legal Elite, and is one of a handful of south Florida lawyers recognized by the 2011 Florida edition of Super Lawyers as a mediator in its Alternative Dispute Resolution category.

A graduate of the University of Pennsylvania and the University of Virginia law school, Mr. Carter is a member of the American Bar Association, The Florida Bar (former Chair, Business Law Section, Bankruptcy/UCC Committee), The District of Columbia Bar, the State Bar of Georgia and The Bankruptcy Bar Association of the Southern District of Florida. He also served as a Captain in the U.S. Army.

Mr. Carter is a frequent speaker to real estate industry, business and legal groups. Having represented both borrowers and lenders, he understands the essential needs and perspectives of all stakeholders in a distressed project or business enterprise and is uniquely qualified to provide clients with practical as well as legal advice on how to maximize value in a challenging financial and market environment.

Areas of Practice:

- Bankruptcy and Creditors' Rights
- Mediation
- Distressed Property

Bar Admissions:

- Florida, 1975
- District of Columbia, 1972
- Georgia, 1970

Education:

University of Virginia School of Law, 1970, J.D.
University of Pennsylvania, 1967, B.A.

Professional Associations and Memberships:

The Bankruptcy Bar Association of the Southern District of Florida
American Bar Institute
American Bar Association (Member: Litigation, Business Law, Commercial Financial Services, Business Bankruptcy, and Creditors' Rights Litigation committees)
The Florida Bar (Past Chairman: Bankruptcy/UCC Committee, 1985-1986; and Member: Corporation, Banking and Business Law Section)
The District of Columbia Bar
State Bar of Georgia

Awards and Recognitions:

AV Rated by Martindale-Hubbell
Ranked as a Senior Statesman for Florida Bankruptcy in Chambers
USA: America's Leading Lawyers for Business
Listed in Florida Trend's Legal Elite, 2007
Listed in The Best Lawyers in America since 1991 for Bankruptcy and Creditor-Debtor Rights Law
Ranked as one of South Florida's top lawyers by the South Florida Legal Guide
Fellow, American College of Bankruptcy

JOHN S. FREUD, ESQUIRE
CURRICULUM VITAE

General Civil Trial Practice, including Complex Commercial/Construction/Real Estate/Securities Litigation, Creditor's Rights, Employee/Civil Rights, Environmental, Government/Administrative, Insurance/Coverage/Bad Faith/Surety, Intellectual Property, Landlord/Tenant/ADA Compliance, Marine, Mass Tort/Class Action, Nursing Home, Personal Injury, Product and Professional Liability, Property Damage, Professional Malpractice, Title Insurance, Wrongful Death

EDUCATION:

- A. Colleges: Brandeis University - Waltham, Massachusetts
Bachelor of Arts, Magna Cum Laude (1977)

Harvard University (Summer, 1975)
- B. Law School: University of Miami School of Law
Coral Gables, Florida
Juris Doctorate (1981)

HONORS/DISTINCTIONS

- A. Martindale-Hubbell - AV Rating (highest available rating)
B. Best's Directory of Recommended Insurance Attorneys
C. Hines Insurance Counsel
D. Who's Who in America/American Law
E. Who's Who of Emerging Leaders in America

MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS

- A. The Florida Bar (active)
B. The Massachusetts Bar (inactive status)
C. Florida Academy of Professional Mediators, Inc. (Diplomate - highest distinction available)
D. Florida Windstorm Network - Listed Umpire

ADMISSIONS TO PRACTICE

- A. Florida Supreme Court
B. Trial Bar, United States District Courts
(Southern, Middle and Northern Districts of Florida)
C. United States Court of Appeals, Fifth and Eleventh Circuits
D. Supreme Court, Commonwealth of Massachusetts
E. United States Supreme Court
F. Certified Mediator - Fl. Supreme Ct.; Federal District Court; NASD
G. Certified Arbitrator - Fl. Supreme Ct.; NASD

JAMES H. GILBERT

James H. Gilbert is a former Associate Justice of the Minnesota Supreme Court. He is a former certified trial lawyer (1997 – 2004) and was named Distinguished Jurist of the Year for 2004 by the Academy of Certified Trial Lawyers of Minnesota. In 2000 he also received 97% of the votes in the Minnesota State Bar Association Preference Poll.

A member of Meshbesh & Spence, Ltd. from 1972 through 1998, Justice Gilbert served as the law firm's managing partner from 1984-1992, and as its chief executive officer from 1996-1997. Appointed in 1997 by former Governor Arne Carlson as an Associate Justice of the Minnesota Supreme Court, Justice Gilbert then garnered 69% of the vote in a statewide election to become elected to the position in 2000, where he served until 2004. As an Associate Justice, he reviewed more than 5,000 petitions, participated in more than 800 decisions and authored numerous opinions, concurrences and dissents.

As both a trial attorney and Associate Justice of the Minnesota Supreme Court, Justice Gilbert has many years of practical experience with diverse cases including commercial litigation, real estate, corporate and business law, insurance, employment law and discrimination. He has completed both *Arbitrator I – Fundamentals of the Arbitration Process* and *Arbitrator II – Advanced Case Management Issues* with the American Arbitration Association and was a member of the American Arbitration Association National Roster of Neutrals from 2004-2008.

During his long legal career, Justice Gilbert has served both the law profession and the community in a variety of ways.

- 1992-1997: Chair, Ad Hoc Committee on Appointments to the Supreme Court, Appellate Court, Minnesota Tax Court and Workers' Compensation Court of Appeals. In this position, Justice Gilbert helped to advise former Governor Arne Carlson on more than 90 judicial appointments
- 1997-2003: Minnesota State Bar Association Certified Civil Trial Specialist.
- From 1998 to 2007: Member of the State Board of Directors for MN D.A.R.E. (Drug Abuse Resistance Education), MN D.A.R.E. Advisory Council.
- 2004-2008: Appointed by the Minnesota Supreme Court as chair of the Standing Committee on No-Fault Arbitration for Minnesota. The committee is charged with reducing caseload numbers in Minnesota courts and to speed the process of No-Fault Automobile Claim arbitration.
- Appointed Chairman of the Minnesota News Council's hearing panel, effective January 2007 - January 2011.
- Appointed by the Minnesota Supreme Court to be acting Chief Justice of the Minnesota Supreme Court from August through September 2008 to hear a contested election case.
- 2008 Minnesota State Bar Association Certified Civil Arbitrator.
- Qualified Neutral under Minnesota Rule 114.
- President and Founder of Gilbert Mediation Center, Ltd.

Justice Gilbert has been licensed to practice law in Minnesota since 1972. He was admitted to practice in Wisconsin courts in 1984, The United States Tax Court in 1978, the U.S. District Court-Minnesota, 8th Circuit Court of Appeals in 1988, U.S. Supreme Court in 1984, and the U.S. District Court-Arizona in 1996. He also is a member of the Minnesota State and Hennepin County Bar Associations.

Contact James H. Gilbert:

Phone: 952-767-0167
Toll-free: 877-ADR-0167 (877-237-0167)
E-Mail: jhgilbert@lawgilbert.com

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
www.flsb.uscourts.gov

In re:

CHAPTER 11

PALM BEACH FINANCE PARTNERS, L.P.,
PALM BEACH FINANCE II, L.P.,

Case No. 09-36379-PGH
Case No. 09-36396-PGH
(Jointly Administered)

Debtors.

_____ /

**ORDER GRANTING LIQUIDATING TRUSTEE’S AMENDED MOTION
FOR ENTRY OF ORDER ESTABLISHING UNIFORM
MEDIATION PROCEDURES FOR ADVERSARY PROCEEDINGS**

THIS CAUSE came before the Court on _____ at __:___.m. upon the Liquidating Trustee’s Amended Motion for Entry of Order Establishing Uniform Mediation Procedures for Adversary Proceedings [ECF No. ___] (the “*Motion*”).¹ The Court, having reviewed the Motion:

ORDERS as follows:

1. The Motion is **GRANTED**.

¹ All capitalized terms not defined in this Order shall have the meaning ascribed to such term as set forth in the Motion.

2. The Mediation Procedures set forth in the Motion with respect to the Adversary Proceedings are approved.

3. The following Mediation Procedures shall apply to all Adversary Proceedings:

a) Mediator Selection. The following three pre-selected mediators are appointed to mediate the Adversary Proceedings (referred to each as a “*Mediator*” and collectively as, the “*Mediators*”): Frances Carter, Esq., John Freud, Esq. and James Gilbert, Esq. Nothing shall prevent the Liquidating Trustee and any Defendant in a particular Adversary Proceeding from agreeing to select a different mediator.

b) Time of Mediation Conference. On or before the later of (i) 30 days from the date of this Order or (ii) 60 days from the date service of a particular summons and complaint, each Defendant shall provide the Liquidating Trustee with three proposed dates on which it is available to mediate.

c) Attendance at Mediation Conference. Each Party shall participate in the Mediation Conference in good faith and shall ensure that a representative is present in person at the Mediation Conference. Representatives may not appear telephonically unless otherwise agreed to by the parties and the Mediator. The Trust Monitor may appear as a representative of the Liquidating Trustee.

d) Fees. The Parties will be responsible for an equal and pro rata share of the total amount of the Mediator’s fees and costs. The Mediators have each agreed to charge an hourly rate of \$400 in connection with the Adversary Proceedings. The Liquidating Trustee requests that he be authorized to pay all of the fees and costs of a Mediator after review of the Mediator’s bill without further order of the Court. The Liquidating Trustee shall be entitled to seek reimbursement from the Defendant for its proportionate share of the Mediator’s fees and costs and such Defendant shall have ten (10) days following

PROPOSED

receipt of the Liquidating Trustee's request for reimbursement to submit payment in full to the Liquidating Trustee.

e) Cancellation. If a scheduled mediation is cancelled any less than ten (10) days prior to the scheduled mediation date, the Mediator shall be entitled to a cancellation fee equal to \$800 (or the equivalent of two (2) hours at the Mediator's agreed billing rate).

4. As to all Defendants as to which service of the summons, complaint and pretrial order has not been accomplished, the Liquidating Trustee shall serve a copy of this Order along with the complaint, summons and pretrial order on each such Defendant, as soon as an appropriate address for service of process has been obtained.

5. The Amended Mediation Procedures and corresponding notice procedures shall remain in effect unless modified by subsequent Court Order.

6. The Court may modify this Order for good cause shown.

###

Submitted By:

Michael S. Budwick, Esquire
Florida Bar No. 938777
mbudwick@melandrussin.com
MELAND RUSSIN & BUDWICK, P.A.
Counsel for Liquidating Trustee
3000 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-6363
Telefax: (305) 358-1221

Copies Furnished To:

Michael S. Budwick, Esquire, is directed to serve copies of this Order on all parties in interest and to file a Certificate of Service.