

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.,

Debtors.

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

**LIQUIDATING TRUSTEE'S MOTION TO APPROVE DISTRIBUTION
SCHEME PURSUANT TO 11 U.S.C. § 510(b) AND BANKRUPTCY RULE 9019**

Barry E. Mukamal, in his capacity as liquidating trustee ("*Liquidating Trustee*") for the Palm Beach Finance II Liquidating Trust (the "*Liquidating Trust*"), by and through undersigned counsel, and pursuant to 11 U.S.C. § 510(b) and *Fed. R. Bankr. P.* 9019, seeks an Order from this Court approving the Liquidating Trustee's proposed distribution to certain limited partner creditors and interest holders ("*LPs*") of Palm Beach Finance II, L.P. ("*PBF II*") as set forth below. In support of this relief, the Liquidating Trustee states the following:

PRELIMINARY STATEMENT

On September 22, 2016¹ the Liquidating Trustee sought either a judicial settlement conference or mediation of matters associated with 11 U.S.C. § 510(b) that may impact the creditors of Palm Beach Finance Partners, L.P. ("*PBFP*") and PBF II ("*510(b) Issues*"). Given the number of parties potentially affected by the application of 11 U.S.C. § 510(b), and the Liquidating Trustee's desire to make a distribution as early as reasonably practicable, mediation with the LPs affected by any proposed distribution where 11 U.S.C. § 510(b) may have application was both appropriate and necessary. On October 20, 2016 the Court gave

¹ See Liquidating Trustee's Motion for Judicial Settlement Conference or in the Alternative for Mediation on 510(b) Issues [ECF No. 3036].

authority to the Liquidating Trustee to conduct a judicial settlement conference or mediation.² On November 15, 2016, after notice to all parties in interest, the Liquidating Trustee participated in a mediation (“*Mediation*”) conducted by Harley E. Riedel (“*Mediator*”) that addressed the impact of 11 U.S.C. § 510(b) on LP claims in the estates of PBFP and PBF II (“*510(b) Issues*”). Palm Beach Offshore, Ltd. (“*PBO*”), Palm Beach Offshore II, Ltd. (“*PBO II*” together with PBO, the “*Offshore Funds*”) attended the mediation as non LP creditors of PBF II. Skybell Select LP (“*Skybell*”), JDFF Master Fund, LP (“*JDFF Fund*”) and John Daniel (“*Mr. Daniel*”) attended the Mediation as equity interest holders of PBF II.³ As evidenced by their joinders, the Offshore Funds, JDFF Fund and Mr. Daniel agree to the Liquidating Trustee’s proposed distribution scheme resulting from the Mediation.⁴

As more fully described below, the Liquidating Trustee seeks approval of a waterfall distribution scheme whereby LPs are treated differently depending on whether they filed proofs of claim and sent prepetition redemption requests. Specifically, the proposed distribution scheme divides the LPs into 4 categories for distribution purposes only.

An important distinction between the treatment of LPs in PBF II versus the treatment of LPs in PBFP is that the PBF II estate includes the debt of the Offshore Funds, whereas the only parties affected by the distribution scheme proposed in PBFP are LPs. As such, the distribution scheme for PBF II is impacted by an additional “carve-out” component, whereby the Offshore Funds agree to carve-out a percentage of their distribution (which is senior in priority to any LP

² See Order Granting Liquidating Trustee’s Motion for Judicial Settlement Conference or in the Alternative for Mediation on 510(b) Issues [ECF No. 3065].

³ The mediation also addressed the claims of LPs in the estate of PBFP, and LPs of PBFP attended to negotiate issues related to the PBFP estate. However, the distribution scheme for LPs in PBFP are addressed by separate motion.

⁴ The Liquidating Trustee has recently been advised that Sky Bell does not support the proposed distribution scheme.

claim) to fund distributions for the various categories of LPs described below which are junior in priority to the Offshore Funds allowed claims.

The Offshore Funds will receive (i) 98.5% of each dollar distributed by PBF II between \$0 and \$20 Million, (ii) 97% of each dollar distributed by PBF II between \$20 Million and \$60 Million and (iii) 96.3% of each dollar distributed by PBF II in an amount greater than \$60 Million. Put differently, although the Offshore Funds are senior in priority to the LPs, in consideration of enabling a mediated settlement that will allow the Liquidating Trustee to promptly make distributions and avoid potentially costly and time-consuming litigation, in order to effectuate the above, the Offshore Funds have agreed to carve out (x) 1.5% of any distributions due to the Offshore Funds between \$0 and \$20 Million, (y) 3.0% of any distributions due to the Offshore Funds between \$20 Million and \$60 Million and (z) 3.7% of any distribution due to the Offshore Funds greater than \$60 Million (collectively, the “*Offshore Carve-out Distributions*”). The Offshore Funds agreed to the Offshore Carve-out Distributions but took no position on the priority of the categories of LPs in receiving portions of such distributions, and such priority was determined by the Liquidating Trustee.

With respect to the LPs, Category A is comprised of those LPs that filed proofs of claim and made a prepetition redemption request. Such creditors are treated with the highest priority in the proposed LP distribution scheme, because they took actions in the prepetition period that are most consistent with the case law in which a limited partner’s claim was not subordinated. LPs in Category A will be treated as unsecured creditors recovering solely from the Offshore Carve-out Distributions with other LPs based on 100% of their allowed claim amounts.

Category B consists of those LPs that filed proofs of claim but did not send prepetition redemption requests. Such creditors are treated with the second highest priority in the proposed

LP distribution scheme, because their diligence in filing proofs of claim indicates an intent to be treated as unsecured creditors and receive a distribution from this estate and not to have their interests subordinated. LPs in category B are treated as unsecured creditors recovering solely from the Offshore Carve-out Distributions, sharing with other LPs based on 65% of their allowed claim amounts.

Category C is comprised of those LPs that did not file proofs of claim but made prepetition redemption requests. LPs in category C are treated less favorably than LPs in categories A and B, because they failed to file proofs of claim. However, the fact that such LPs made redemption requests indicates an intent to be treated as an unsecured creditor. Although the Liquidating Trustee could take the position that such LPs are not entitled to any distribution as a result of their failure to file a proof of claim, in the exercise of his reasonable business judgment, the proposed treatment of category C more closely comports with the spirit and intent of the Bankruptcy Code. LPs in category C are treated as equity interest holders recovering solely from the Offshore Carve-out Distributions, sharing with other LPs based on 30% of their allowed claim amounts.

Category D consists of those LPs that neither filed proofs of claim nor made prepetition redemption requests. LPs in category D are treated the least favorably because they failed to take action to assert an unsecured claim. That said, the Liquidating Trustee believes in the exercise of his reasonable business judgment that providing for at least some distribution to these LPs is appropriate under the circumstances. As such, LPs in category D are treated as equity interest holders recovering solely from the Offshore Carve-out Distributions, sharing with other LPs based on 15% of their allowed losses.

Many courts take an expansive view of the reach of 11 U.S.C. § 510(b). Accordingly, it could be argued (and is the position of the Offshore Funds) that mandatory subordination of all LP claims, regardless of whether such LPs filed proofs of claim or made prepetition redemption requests, is required by applicable law and by the PBF II fund documents. However, the Liquidating Trustee, in the exercise of his reasonable business judgment does not believe such a result is necessary or appropriate in the circumstances of this case. As set forth herein, the Liquidating Trustee believes the proposed distribution scheme is in the best interest of creditors, is supported by the partnership agreements entered into by PBF II and the individual LPs, Delaware statutory law as well as relevant case law. Accordingly, the Liquidating Trustee requests an order of the Court approving the proposed distribution scheme.

BACKGROUND

1. On November 30, 2009, the Debtors filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida (“*Florida Bankruptcy Court*”). By subsequent Order of this Court, the cases are jointly administered.
2. On January 29, 2010, the United States Trustee appointed the Liquidating Trustee as Chapter 11 trustee in both of the Debtors’ estates. [ECF No. 107].
3. On October 21, 2010, this Court entered its Order Confirming Second Amended Joint Plan of Liquidation [ECF No. 444], creating the Liquidating Trusts, appointing the Liquidating Trustee as Liquidating Trustee and appointing Geoffrey Varga as Trust Monitor.
4. On October 20, 2016, the Court entered its Order Granting Liquidating Trustee’s Motion for Judicial Settlement Conference or in the Alternative for Mediation on 510(b) Issues [ECF No. 3065].

5. On October 27, 2016, the Liquidating Trustee noticed all parties in interest in the PBFP and PBF II estates that a mediation of the § 510(b) issues would occur on November 15, 2016 and November 16, 2016, with Harley E. Riedel, Esq. serving as mediator (“*Mediator*”) [ECF No. 3067]. Parties in interest were invited to attend the mediation either in person or by phone.

6. On November 15, 2016 the Mediation took place, and this Motion and the proposed distribution scheme described herein arises from the Mediation.

RELIEF REQUESTED

7. The Liquidating Trustee seeks an Order from this Court approving the proposed distribution scheme set forth herein.

A. 11 U.S.C. 510(b)

8. When determining the applicability of 11 U.S.C. § 510(b) to the limited partner claims⁵ at issue in this case, we begin, as we must, with the language of the statute.

9. Section 510(b) of the Bankruptcy Code provides:

For the purpose of distribution under this title, a claim **arising from rescission of a purchase or sale of a security of the debtor** or of an affiliate of the debtor, for damages **arising from the purchase or sale of such a security**, or for reimbursement or contribution allowed under section 502 on account of such a claim, **shall be subordinated** to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b) (emphasis added).

⁵ The analysis of 11 U.S.C. § 510(b) is inapplicable to the claims of the Offshore Funds which hold claims for debt, as they were lenders to PBF II not limited partners of PBF II.

B. Analysis of 11 U.S.C. § 510(b)’s Application to Limited Partner Redemption Requests

10. The language of § 510(b) refers to claims arising from “rescission.” However, the LP claims at issue in this case are claims arising from *redemption* requests the Debtors failed to honor before the Petition Date. At least two courts have noted a distinction between a “rescission-based claim, which [is] subject to §510(b) subordination, [and] a claim based on redemption of ownership interests, which *might* not be.”⁶ As noted by the *SeaQuest* court: “Rescission” is defined as “[a] party’s unilateral unmaking of a contract for a legally sufficient reason, such as the other party’s material breach, or a judgment rescinding the contract; voidance.”⁷ Redemption, on the other hand, has been referred to as a conversion of equity to debt.⁸

11. The Court in *Seaquest* referenced the distinction between claims arising from rescission and redemption as follows:

The policy rationales underlying § 510(b) support the result in the circuit court cases because those claimants bargained for an equity position in the debtors *and never converted that equity into debt pre-petition*. A claimant who held equity on the petition date or was promised equity has assumed the risk of enterprise insolvency in exchange for the upside potential of equity ownership. By redeeming equity for debt before the bankruptcy filing, the claimant can convert from the “risk/return position of an equity investor” to a “fixed, pre-petition debt due and owing” the claimant as a creditor.

In re Seaquest Diving, 579 F.3d at 423 (emphasis added).

⁶ *In re Orange Cnty. Nursery Inc.*, 479 B.R. 863, 867 (Bankr. C.D. Cal. 2012) (emphasis in original) *reversed and remanded* other grounds 523 B.R. 692 (C.D. Cal. 2014) (discussing *SeaQuest*, 579 F.3d at 423, which allowed for subordination because the transaction was for rescission, rather than for redemption).

⁷ *In re SeaQuest Diving, LP*, 579 F.3d 411, 419 (5th Cir. 2009)). (quoting BLACK’S LAW DICTIONARY 1332 (8th ed. 2004) (emphasis added)).

⁸ *See id.* at 423 (citing *In re Am. Wagering, Inc.*, 493 F.3d 1067, 1073 (C.D. Cal. 2007)).

12. One way a debtor may convert equity to debt is by issuing a promissory note. If the debtor redeems a security interest by issuing a promissory note, some courts hold that the creditor becomes the equivalent of a regular noteholder – a general unsecured creditor, and thus outside the reach of § 510(b). For example in *SeaQuest*, the court observed that had the transaction been structured as a redemption, the debtor would have retained the LP’s capital contribution, and the LP would have a claim against the debtor’s assets *pari passu* with the debtor’s other creditors. Instead, the debtor essentially agreed to give back the same assets that the LP had contributed in exchange for the LP’s relinquishing its equity stake.⁹

13. Here, while certain LPs made redemption requests prior to the Petition Date, the requests were not honored and no promissory notes or any other securities were ever issued. Even though the LP Agreements contemplate in Section 8.6 that withdrawal proceeds could be paid in “securities or other assets,” this did not occur.

14. It could be argued that the LPs were “deemed to have retired” their interests upon the date of demand, and that the inability or failure of PBFP or PBF II to pay the demands, does not change the identity of the LPs making such demands as creditors. However, it is important to note that Section 8.4 of the LP Agreement makes clear that withdrawals are “effective on the last day of each calendar quarter after allocations of Allocable Net Profits or Allocable Net Losses and the Performance Allocation (if any) as of such date.” *See* Section 8.4 of the LP Agreement. However, in many instances the redemptions were noticed before the end of the quarter, and the end of the quarter occurred before the Petition Date. Arguably, therefore, many redemptions may have become “effective.”

⁹ *In re SeaQuest Diving, LP*, 579 F.3d at 424.

15. While it could be argued that the redemption demands converted equity to debt *at the time the demands became effective*, the broad interpretation of § 510(b) employed by the majority of courts, including this Court, could be fatal to such an interpretation. This is because such courts are not focused in their § 510(b) analysis on the identity of the claimants but whether there is some nexus to the purchase or sale of a security.¹⁰

16. The phrase “arising from” in § 510(b) is universally acknowledged by courts to be ambiguous.¹¹ However, the majority of courts (including this Court), interpreting this phrase have adopted a so-called “but-for” test determining that only *some* nexus or causal relationship between the claim and the purchase of the securities must exist to invoke mandatory subordination. These courts take the position that the nexus required should not be limited to claims involving the purchase itself.¹²

17. The most recent circuit level decision analyzing the meaning of “arising from” in § 510(b) is *Pensco Trust Co. v. Tristar Esperanza Properties, LLC (In re Tristar Esperanza Properties, LLC)*, 782 F.3d 492 (9th Cir. 2015).¹³ In *Tristar*, the Ninth Circuit acknowledged that

¹⁰ See *In re NAL Fin. Group, Inc.*, 237 B.R. 225 (Bankr. S.D. Fla. 1999). In *NAL*, this Court adopted “the broader reading of § 510(b),” holding that Section 510(b) applies so long as “the purchase or sale [is] part of the causal link although the injury may flow from a subsequent event.” In *NAL*, this Court found that the cause of action would not have accrued, and the creditor “would not have incurred any damages if [the creditor] did not purchase the [security] in the first place[. Thus,] the purchase is a causal link.” In so-holding, this Court adopted a ‘but for’ test. Here, the LP claims would not have accrued but for the purchase.

¹¹ See e.g. *In re Telegroup, Inc.*, 281 F.3d 133, 138 (3d Cir. 2002) (“We conclude that the phrase “arising from” is ambiguous”); *In re SeaQuest Diving, LP*, 579 F.3d 411, 418 (5th Cir. 2009); *Rombro v. Dufrayne (In re Med Diversified, Inc.)*, 461 F.3d 251, 255 (2d Cir. 2006); *In re Geneva Steel Co.*, 281 F.3d 1173, 1178-79 (10th Cir. 2002); *Pensco Trust Co. v. Tristar Esperanza Properties, LLC (In re Tristar Esperanza Properties, LLC)*, 488 B.R. 394, 402 (9th Cir. 2015) (“What constitutes ‘arising from’ has been considered and found ambiguous by the Second, Third, Fifth, Ninth and Tenth Circuits. No circuit has taken a contrary view.”).

¹² See e.g., *In re Telegroup, Inc.*, 281 F.3d 133, 138 and 143 (“The claim would not exist but for claimants’ purchase of debtor’s stock”); *In re NAL Fin. Group, Inc.* 237 B.R. 225, 234 (Bankr. S.D. Fla. 1999) (J. Hyman) (“Interbank would not have these causes of action against NALF had the parties not entered into these agreements.”).

¹³ A recent decision of a bankruptcy court in the Southern District of New York has criticized *Tristar* as being inconsistent with the law in the Second Circuit which contemplates only 2 rationales for mandatory subordination under § 510(b): either the claimant (1) took on the risk and return expectations of a shareholder rather than a

at least one bankruptcy court has held that the status of the claim on the date of the petition controls the subordination question.¹⁴ In *MarketXT*, the court reasoned “It is black letter law that claims are analyzed as of the date of the filing of a petition, not as of a hypothetical date in the past.”¹⁵ Because the creditor held a judgment based on notes issued following the creditor's exercise of the liquidation preference of its preferred stock, it was a creditor on the date of the petition and thus its claim was not subject to subordination.¹⁶ Various other courts have followed similar reasoning in refusing to subordinate certain creditors' claims even though their debt instruments or judgments derived from an equity interest.¹⁷

18. These cases suggest that to be subject to subordination, the claimant must, at the very least, enjoy the rights and privileges of equity ownership on the date of the bankruptcy petition. See *Mobile Tool Int'l*, 306 B.R. at 782. However, the Ninth Circuit rejected that principle in *In re Betacom of Phoenix, Inc.*, 240 F.3d 823 (9th Cir. 2001), holding that a claimant who bargained for an equity position was subject to subordination, even though he never enjoyed the benefits of equity ownership. *Betacom*, 240 F.3d at 829–30.

19. Based on the foregoing analysis, even though LPs that timely asserted a contractual redemption demand could, under the minority view, assert that their claims are the “equivalent” of an unsecured claim and should share *pari passu* with other unsecured creditors in

creditor; or (2) seeks to recover a contribution to the equity pool relied upon by creditors in deciding whether to extend credit to the debtor. See *In re Lehman Bros, Inc.* – B.R. --, 2015 WL 6163438 at *39 (Bankr. S.D.N.Y. Oct. 8, 2015) citing *In re Med Diversified, Inc.* 461 F.3d 251, 256 (2d Cir. 2006) and *KIT Digital, Inc. v. Invigor Group Ltd. (In re KIT Digital, Inc.)*, 497 B.R. 170, 183 (Bankr. S.D.N.Y. 2013).

¹⁴ See *In re MarketXT Holdings Corp.*, 361 B.R. 369, 389 (Bankr. S.D.N.Y. 2007).

¹⁵ *Id.* (citing 5 Lawrence P. King et al., COLLIER ON BANKRUPTCY ¶ 506.04 (15th ed. rev. 2006)).

¹⁶ *Id.* at 389–90.

¹⁷ See, e.g., *In re Cybersight LLC*, No. 02–11033, Civ. A. 04–112 JJF, 2004 WL 2713098, at *4 (D. Del. Nov. 17, 2004); *In re Swift Instruments, Inc.*, No. NC–11–1426–DHSA, 2012 WL 762833, at *7–8 (9th Cir. BAP Mar. 8, 2012); *In re Mobile Tool Int'l, Inc.*, 306 B.R. 778, 782 (Bankr. D. Del. 2004).

any distribution, the majority of cases analyzed by the Trustee suggest that this Court would likely invoke subordination if it finds at least some nexus between such LPs claims and the purchase of securities. In addition, the Offshore Funds have informed the Liquidating Trustee that they strongly believe that subordination of LP claims is clearly mandated by the Bankruptcy Code, applicable case law, and the PBF II fund documents, and that they would vigorously pursue such subordination in the Court if not for the settlement and prompt distributions pursuant to such settlement sought by this Motion.

20. Given the uncertainty surrounding the application of 510(b), especially in the context of the complex facts at issue in this case, implementation of the proposed distribution scheme/settlement is appropriate and in the best interests of the estate and its creditors.

THE MEDIATION

A. The Offshore Creditors

21. The Offshore Funds hold over \$718 Million of allowed unsecured claims against the PBF II estate. Although the proposed distribution scheme does not affect the superior priority of the Offshore Funds claims, the Offshore Funds could and has informed the Liquidating Trustee that, absent the settlement, would assert an interest in all funds available for distribution as a result of their priority position, and thus their participation and agreement to the proposed distribution scheme and to fund the carve-out described herein was greatly beneficial to the Estate. The Offshore Funds attended the Mediation.

B. The LP Participants

22. John Daniel, through JDFF Master Fund, LP, holds \$1.5 Million of allowed equity interests in the PBF II estate. John Daniel attended the Mediation.

23. Skybell holds over \$5.6 million of allowed equity interests against the PBF II estate. Skybell attended the Mediation.

C. The Liquidating Trustee's Conclusions Regarding the Application of 11 U.S.C. §510(b).

24. The Liquidating Trustee has considered documentation governing the limited partners of PBFP as well as relevant statutory and case law and has determined as follows:

a) The PBF II limited partnership agreements contemplated that Limited Partners, under certain conditions, could withdraw their capital from the partnership by giving notice, and shall be deemed to have retired from the partnership as of the date of such withdrawal. See Limited Partnership Agreement at §8.4(a). Section 11.3 of the Limited Partnership Agreements expressly provide that distributions to Limited Partners are subordinated to repayment of the funded notes underlying the Offshore Funds' Class 2B Claims.

b) The Limited Partnership Agreements are governed by the laws of the State of Delaware. Pursuant to Del. Code. Ann. tit. 6, § 17-606, at the time a limited partner becomes entitled to receive a distribution, he or she has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. See Del. Code. Ann. tit. 6, 17-606.

c) A number of bankruptcy courts have held that former equity holders are entitled to the status of creditors, and not subject to subordination pursuant to 11 U.S.C. § 510(b) where, for example, shareholders have triggered repurchase obligations, were issued notes in exchange for stock, or triggered contractual redemption rights. E.g. *In re Mobile Tool Int'l, Inc.*, 306 B.R. 778 (Bankr. D. Del. 2004); *In re Montgomery Ward Holding Corp.*, 272 B.R. 836

(Bankr. D. Del. 2001) (same); *In re Marketxt Holdings Corp.*, 361 B.R. 369 (Bankr. S.D.N.Y. 2007); *In re Cybersight LLC*, No. 02-11033, 2004 WL 2713098 (D. Del. Nov. 17, 2004).

25. The Liquidating Trustee has concluded that viable arguments can be made that the language of 11 U.S.C. § 510(b) and the express language of the PBF II Limited Partnership Agreements are clear and that all LP claims are subordinated to general unsecured creditors and arguably treated as equity interests. Conversely, viable arguments can also be made that an investor who (i) timely asserted a contractual redemption demand, and/or (ii) filed a proof of claim asserting creditor status should have the status of a creditor, subordinated only to non-investor third party creditor claims. An investor who fails to take such steps is arguably purely equity and not entitled to creditor status. However, a determination of how 11 U.S.C. § 510(b) should be applied in this case is not free from doubt, as the analysis is fact specific and subject to dispute.

26. The Liquidating Trustee, in the exercise of his reasonable business judgment believes that the proposed distribution scheme set forth below is appropriate and should be approved by this Court. The proposed distribution scheme will recognize legal priorities based on the actions specific investors took to protect their rights and obtain creditor status, provide some distribution to all categories of claimants, and represents a resolution of potentially lengthy and costly litigation that will further reduce the funds available and further delay distributions, with significant uncertainty as to outcome.

D. The Proposed Waterfall Distribution Scheme

27. The Offshore Funds hold allowed claims for debt, and are therefore superior in priority to the LPs with respect to distribution of estate assets. As a result of their superior

priority, the Offshore Funds are entitled to payment of their allowed claims in full before any funds are distributed to the LPs which are junior in priority. Nonetheless, the Offshore Funds have agreed to carve-out a percentage of what would otherwise be their distribution to fund distributions to the LPs. Specifically, the Offshore Funds will receive (i) 98.5% of each dollar distributed by PBF II between \$0 and \$20 Million, (ii) 97% of each dollar distributed by PBF II between \$20 Million and \$60 Million and (iii) 96.3% of each dollar distributed by PBF II in an amount greater than \$60 Million. Thus, the Offshore Funds have agreed, in the interest of settlement and without acknowledging any legal or equitable rights of LPs to receive any distributions, to carve-out 1.5% of any distributions between \$0 and \$20 Million, 3.0% of any distributions between \$20 Million and \$40 Million and 3.7% of any distributions over \$60 Million. The carve-outs granted by the Offshore Funds will fund distributions to the various categories of LPs described below.

28. The Liquidating Trustee proposes the following distribution scheme for different categories of limited partners:

a) **Category A:** Creditors who (i) filed proofs of claim and (ii) made prepetition redemption requests or (iii) have unsecured claims allowed pursuant to Court Order will share in the Offshore Carve-out Distributions based on 100% of their allowed claim amounts, and will receive a different distribution depending on the amount of their allowed claim. Specifically, claims in Category A allowed in an amount between \$0 and \$20 Million will receive 0.95% of each distribution depending on a final claim allowance. Claims in Category A allowed in an amount between \$20 Million and \$60 Million will receive 1.90% of each distribution depending on a final claim allowance. And claims in Category A allowed in an amount over \$60 Million will receive 2.34% of

each distribution depending on a final claim allowance. LPs in this category are treated with the highest priority in the proposed distribution scheme, because they took actions in the prepetition period that are most consistent with the caselaw referenced above in which a limited partner's claim was not subordinated. The total of claims in Category A equals \$54,008,689.

b) **Category B:** Creditors who (i) filed proofs of claim and (ii) did not make prepetition redemption requests will share in the Offshore Carve-out Distributions based on 65% of their allowed claim amounts, and will receive a different distribution depending on the amount of their allowed claim. Specifically, claims in Category B allowed in an amount between \$0 and \$20 Million will receive 0.21% of each distribution depending on a final claim allowance. Claims in Category B allowed in an amount between \$20 Million and \$60 Million will receive 0.42% of each distribution depending on a final claim allowance. And claims in Category B allowed in an amount over \$60 Million will receive .51% of each distribution depending on a final claim allowance. The LPs in category B are treated with the second highest priority in the proposed distribution scheme, because their diligence in filing proofs of claim indicates an intent to be treated as unsecured creditors and receive a distribution from this estate and to not have their interests subordinated. The total of claims in Category B equals \$11,862,500.

c) **Category C:** Equity interest holders who (i) did not file proofs of interest but (ii) made prepetition redemption requests will share in the Offshore Carve-out Distributions based on approximately 30% of their allowed equity amounts, and will receive a different distribution depending on the amount of their allowed equity interest. Specifically, equity interests in Category C allowed in an amount between \$0 and \$20

Million will receive 0.28% of each distribution depending on a final claim allowance. Equity interests in Category C allowed in an amount between \$20 Million and \$60 Million will receive 0.55% of each distribution depending on a final claim allowance. And equity interests in Category C allowed in an amount over \$60 Million will receive 0.68% of each distribution depending on a final claim allowance. LPs in category C are treated less favorably than LPs in Categories A and B, because they failed to file proofs of claim. However, the fact that such LPs made redemption requests indicates an intent to be treated as an unsecured creditor. Although the Liquidating Trustee could take the position that such LPs are not entitled to any distribution as a result of their failure to file a proof of claim, in the exercise of his reasonable business judgment, the proposed treatment of Category C more closely comports with the spirit and intent of the bankruptcy code. The total of interests in Category C equals \$15,770.851.

d) **Category D:** Equity interest holders who (i) did not file proofs of interest and (ii) did not make prepetition redemption demands will share in the Offshore Carve-out Distributions based on approximately 15% of their allowed amounts, and will receive a different distribution depending on the amount of their allowed equity interest. Specifically, equity interests in Category D allowed in an amount between \$0 and \$20 Million will receive 0.07% of each distribution depending on a final claim allowance. Equity interests in Category D allowed in an amount between \$20 Million and \$60 Million will receive 0.13% of each distribution depending on a final claim allowance. And equity interests in Category D allowed in an amount over \$60 Million will receive 0.17% of each distribution depending on a final claim allowance. LPs in category D are treated the least favorably because they failed to take action to assert an unsecured claim.

That said, the Liquidating Trustee recognizes that these LPs were victims of the Petters Ponzi scheme as well, and believes in the exercise of his reasonable business judgment that providing for at least some distribution to these LPs is appropriate under the circumstances. The total of interests in Category D equals \$3,829,053.

E. Fed. R. Bankr. P. 9019

29. Although a quasi “settlement” between the Liquidating Trustee, the Offshore Funds and one of the LPs that attended mediation, as a result of the participation at Mediation and agreement of Mr. Daniel to the proposed distribution scheme, the Liquidating Trustee seeks approval of the proposed distribution scheme not only pursuant to 11 U.S.C. § 510(b), but also Federal Rule of Bankruptcy Procedure 9019.

30. Rule 9019 provides in relevant part that “[o]n motion ... and after a hearing on notice to creditors; the debtor ... and to such other entities as the Court may designate, the Court may approve a compromise or settlement.”

31. Approval of a settlement in a bankruptcy proceeding is within the sole discretion of the Court and will not be disturbed or modified on appeal unless approval or disapproval is an abuse of discretion. *See In re Arrow Air*, 85 BR 891 (Bankr. S.D. Fla. 1988).

32. The standards for approval are well settled and require the Court to inquire into the reasonableness of the proposed settlement. *See, e.g., Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983); *Florida Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). The inquiry need only determine whether the settlement falls below the lowest point of the range of reasonableness. *See W.T. Grant Co.*, 699 F.2d at 608; *see also In re Martin*, 91 F.3d 389 (3rd Cir. 1996); *In re Louise's Inc.*, 211 B.R. 798 (D. Del. 1997) (setting

forth considerations by the Court for approval of a settlement, including: (i) the probability of success in litigation, (ii) the likely difficulties in collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (iv) the paramount interest of the creditors.

The Distribution Scheme Should be Approved

33. Based upon the above legal principles, the Liquidating Trustee asserts that the proposed distribution scheme falls well above the lowest point of the range of reasonableness and, thus, should be approved.

Probability of success in litigation

34. The Liquidating Trustee could assert that all LP claims should be subordinated pursuant to 11 U.S.C. § 510(b). Thus, there is considerable litigation risk between the estates and the LPs if the Liquidating Trustee were to seek subordination of all LP claims. This is one of the main factors driving the Liquidating Trustee's proposed distribution scheme. However, the Liquidating Trustee does not believe such a result is in the best interest of the estates and its creditors and therefore believes the proposed distribution scheme, as agreed by Mr. Daniel, favorably resolves this matter for all LP creditors, as it represents a distribution scheme that is not only logical but designed to elicit the most equitable distribution for all the LPs, not just Mr. Daniel.

35. In any event, there are litigation risks both on proving the elements of 11 U.S.C. § 510(b) and the arguing about the application of the partnership agreements, Delaware statutory law and the application of relevant caselaw.

Collectability

36. As a result of the unique nature of the relief requested herein, collectability is not a significant issue that militates one way or another with respect to the relief requested.

Complexity of litigation and attendant expense, inconvenience and delay

37. This is a meaningful consideration that militates in favor of approval of the Stipulation.

38. In sum, although the LP claims outlined above could arguably be covered within the scope of 11 U.S.C. § 510(b), as noted above, there are good arguments as to why 510(b) should not apply. To the extent the matter is disputed, any litigation of specific LP claims in relation to § 510(b) would potentially require the retention of experts and fact discovery before a trial could take place. Coupled with the legal hurdles outlined above, the result of these efforts will be substantial fees of professionals that would significantly diminish the net result of any recovery against the Transferee.

39. The proposed distribution scheme addresses these concerns. The LPs would avoid litigating fact specific claims, with the attendant expense and delay of litigation being nullified.

Paramount interest of creditors

40. The proposed distribution scheme represents an appropriate resolution of the § 510(b) Issues, which have significant legal concerns, gives certainty to the Liquidating Trusts and avoids the risk, expense and delay attendant with litigation. As such, the proposed distribution scheme is in the paramount interest of the Liquidating Trusts and their stakeholders and should be approved.

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter an Order approving the proposed distribution scheme and granting such other relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on January 11, 2017, via the Court's Notice of Electronic Filing upon the Registered Users listed on the attached Exhibit 1, via Regular U.S. Mail upon the parties listed on the Court's Manual Notice List attached as Composite Exhibit 2, the Court's Matrices in Case No. 09-36379-BKC-PGH and Case No. 09-36396-BKC-PGH attached as Composite Exhibit 3¹⁸, and those additional addresses set forth on Composite Exhibit 4.

s/ Peter D. Russin
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Attorneys for Barry E. Mukamal,
Liquidating Trustee

¹⁸ "ADDL" means these additional parties served as a courtesy. See Composite Exhibit 4.

"BAD" means that it is a known bad address; hence, no service by mail.

"DUP" means that the address appears more than once on this exhibit and is only being served one time by mail.

"NEF" means that service was made by Notice of Electronic Filing as set forth on Exhibit 1 and is not being additionally served by mail.

"NNR" means no notice is required.

"PBFP" means that entity appears on both matrices and only being served once.

"N-WD" means no notice required as such party has filed a Notice of Withdrawal with this Court.

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.

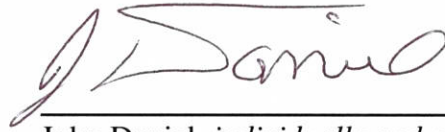
**JOINDER OF JDFF MASTER FUND, LP AND JOHN DANIEL TO
LIQUIDATING TRUSTEE'S MOTION TO APPROVE DISTRIBUTION
SCHEME PURSUANT TO 11 U.S.C. § 510(b) AND BANKRUPTCY RULE 9019**

JDFF Master Fund, LP ("**JDFF Fund**") and John Daniel ("**Mr. Daniel**") individually, file this joinder ("**Joinder**") to the *Liquidating Trustee's Motion to Approve Distribution Scheme Pursuant to 11 U.S.C. § 510(b) and Bankruptcy Rule 9019* ("**Motion**") and incorporates the argument and recitation of case law set forth therein as if fully set forth herein and further states as follows:

On November 15, 2016, Mr. Daniel on behalf of himself individually and for JDFF Fund participated in a mediation ("**Mediation**") conducted by Harley E. Riedel ("**Mediator**") that addressed the impact of 11 U.S.C. § 510(b) on LP claims in the estates of PBFP and PBF II ("**510(b) Issues**"). Mr. Daniel participated in the Mediation in his capacity as an equity interest holder of PBF II.

Mr. Daniel, through JDFF Fund, holds \$1.5 Million of allowed equity interests in the PBF II estate. Mr. Daniel and JDFF Fund agree to the Liquidating Trustee's proposed distribution scheme resulting from the Mediation.

WHEREFORE, JDFF Fund and Mr. Daniel respectfully requests that this Court enter an Order approving the proposed distribution scheme and granting such other relief this Court deems just and proper.

A handwritten signature in black ink, appearing to read "J. Daniel", is positioned above a horizontal line.

John Daniel, *individually and on behalf of*
JDFF Master Fund, LP

Mailing Information for Case 09-36379-PGH

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Manual Notice List for both cases: 09-36379 and 09-36396

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Label Matrix for local noticing 113C-9 Case 09-36379-PGH Southern District of Florida West Palm Beach Wed Jan 11 10:23:37 EST 2017	Ashton Revocable Living Trust c/o Helen Chaitman 45 Broadway New York, NY 10006-3007	BMO Harris Bank, N.A. c/o Charles W. Throckmorton 2525 Ponce de Leon 9th Floor Coral Gables, FL 33134-6039
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